## No. 05-19-00607-CV

PETER BEASLEY,	§ IN THE 5 <sup>th</sup> DISTRICT COURT
Appellant,	§ FILED IN § 5th COURT OF APPEALS § DALLAS, TEXAS
v.	§ COU <b>R/B10240PP:27A415S</b> AM
SOCIETY FOR INFORMATION MANAGEMENT, ET. AL,  Appellees.	§ LISA MATZ § Clerk
	§ DALLAS, TEXAS

OPPOSED VERIFIED MOTION TO RECUSE JUSTICE DAVID EVANS
TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES, Appellant, Peter Beasley, *pro se*, pursuant to the Rule 16.2 of the Rules of Appellate Procedure, Rules 18a and 18b of the Texas Rules of Civil Procedure, and § 75.551 (d) of the Government Code, and in support of this Verified Motion to Recuse, states the following:

- 1. Appellant seeks the recusal of The Honorable Justice David Evans,
  - a. to uphold due process,
    - May an ousted judge be reappointed to decide the same controversy the public had defeated his authority to decide, and
  - b. due to a pattern, including 2018 [EXHIBIT A] and 2016 [EXHIBIT B] distorted opinions by Justice Evans, to discredit Beasley, demonstrating that the judge's impartiality might reasonably be questioned, and
  - c. by rule and under the spirit of Rule 16a.

# Facts Supporting Recusal

- 2. November 6, 2018, Justice Robbie Partida-Kipness and the North Texas citizenry, which includes Beasley, voted to remove Justice Evans from the 5<sup>th</sup> Court of Appeals at the end of his term in December 2018. At the time, Justice Evans served in Place 2.
- 3. Just 5 days before that general election defeat, November 1, 2018, Justice Evans authored an opinion in Cause No. 05-17-01286-CV, a parallel<sup>1</sup> conflict between the parties in this lawsuit. [EXHIBIT A]. This opinion was adverse to Beasley, and affirmed a \$211,032 attorney fee award to Appellees' counsel.
- 4. Justice Evans' "2018 Opinion" falsified relevant facts (by omission) completely ignoring that Beasley appealed under appellate Rule 34.6(c) with a partial reporter's record to prevent the court from making presumptions against him.
- 5. Irrespective of the appellate rules, Justice Evans' falsified opinion presumed in a November 3, 2017 evidentiary hearing that never occurred Beasley waived his right to trial by jury<sup>2</sup> and presumed there were facts that must

<sup>&</sup>lt;sup>1</sup> The underlying cause of action from the No. 05-17-01286-CV appeal, was nonsuited, and refiled, and bore the genesis of this No. 05-19-00607-CV appeal. Both appeals are between identical parties, with the same defense / appellees counsel, and based on the same underlying dispute.

<sup>&</sup>lt;sup>2</sup> "Further, there is no reporter's record of the November 3, 2017 hearing so there is no record that any objection was made and ruled upon by the trial court. Accordingly, as Beasley cannot demonstrate that error was preserved, he has waived his right to complain on appeal that the

have supported the judgment<sup>3</sup>. Given that the opinion does not even mention the Rule 34.6(c) protections, the facts do actually justify the final opinion, and the Texas Supreme Court denied Beasley's Petition for Review on February 7, 2020.

- 6. Beasley's lawyer, Chad Baruch, briefed that the omission in Justice Evans' opinion was intentional and wrongful. [EXHIBIT C].
  - "Whether by oversight or intentionally, the court of appeals violated rule 34.6(c) and wrongfully deprived Beasley of a merits decision on his sufficiency challenge—a decision that almost inarguably would have resulted in reversal and remand for a trial on attorney's fees. This Court should grant review to clarify that once properly invoked, rule 34.6(c) precludes application of the presumption concerning an unrequested transcript." *Beasley v. Society for Information Mgmt.*, No. 19-0091, (Tex. Aug. 5, 2019), Brief on the Merits, Charles "Chad" Baruch, pg. 15, EXHIBIT C.
- 7. Justice Evans' "2018 Opinion" followed a September 20, "2016 Opinion" by him which was also adverse and discrediting to Beasley incorrectly suggesting a nonsensical, frivolous appeal of a voluntary dismissal with prejudice. [EXHIBIT B].

trial court denied his right to a jury on the issue of reasonableness and necessity of fees." *Beasley v. Society for Information Mgmt.*, No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed) (mem. op.)

MOTION TO RECUSE JUSTICE DAVID EVANS

<sup>&</sup>lt;sup>3</sup> "Without this record, we are unable to evaluate what evidence or testimony was relied on by the trial court during the hearing and we must presume that the evidence supports the trial court's judgment." *Id*.

- 8. November 1, 2019, Governor Abbott appointed Justice Evans back onto the 5<sup>th</sup> Court of Appeals, but now in Place 3.<sup>4</sup>
- 9. February 26, 2020, this court assigned Justices Carlyle, Osborne, and Whitehill to hear this appeal on April 26, 2020, but by rule, the court may substitute other justices, including Justice Evans, with or without notice. Tex. R. App. P. 39.8(d).
- 10. Justice Evans has thus far taken no action in this appeal, and this motion is filed more than 21 days before the case is set for submission.

## The Rules for Recusal

11. Appellate procedure provides:

The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.

Tex. R. App. P. 16.2

<sup>&</sup>lt;sup>4</sup> Casady, Michelle. "Texas Justice Ousted In Election Gets His Old Job Back." *Law360*, 1 Nov. 2019, <a href="https://www.law360.com/articles/1216081/texas-justice-ousted-in-election-gets-his-old-job-back">www.law360.com/articles/1216081/texas-justice-ousted-in-election-gets-his-old-job-back</a>. EXHIBIT E.

# 12. Texas Civil procedure provides:

A judge must recuse in any proceeding in which the judge's impartiality might reasonably be questioned.

# 13. The Texas Government Code provides:

A judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice may not sit in an appellate case if either party objects to the judge or justice.

Tex. Govt. Code § 75.551(d).

## ARGUMENT AND AUTHORITIES

# Recusal to Uphold Due Process

- 14. In judicial removals, the removed judge shall take no further action in the matter, and there are several ways a judge may be removed from deciding a proceeding:
  - 15. Through a voluntary recusal on the judge's own motion.
  - 16. Through a recusal requested by a party.
  - 17. Through a disqualification under the Texas Constitution.

- 18. Through removal by the State Commission of Judicial Conduct.
- 19. By certain challenges under the Government Code.
- 20. And another valid method that a judge may be removed from a pending matter is due to the expiration of the judges' elected term.
- 21. While this seems to be a matter of first impression, it is infirm under the Texas Due Course and the U.S. Due Process clauses that a judge whose term expires based on a defeat in a public election can be reappointed by the Governor to decide the same or similar controversy between identical parties on the same court which the people removed the judge's authority to decide.
- 22. First, Beasley acknowledges there is as much of an obligation for a judge not to recuse when there is no occasion to do so as there is for the judge to do so when there is.
- 23. But our constitutional protections of Due Process of law serves to prohibit an appointment to the same court of appeals in a different Place, to decide a then pending matter that the people had voted that jurist no longer be eligible to decide.
- 24. Resoundingly, Texans in 2018 ousted every Republican appellate justice up for re-election in Dallas, Houston, San Antonio and Austin courts of appeal,

and Democrats took all the open appellate seats too<sup>5</sup>. Incoming Justice Reichek said it best,

"I think that all of us ran because this court had become an echo chamber. It had been Republican dominated since 1992 and represented institutional interests. If you represent a human, you were screwed at every turn. And if you represented a company, there was a different set of justice. All of us come from a history of representing individuals, and we wanted to do something about it." Justice Reichek, EXHIBIT D.

25. Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections, *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and it is 'as equally unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box.' *United States v. Mosley*, 238 U.S. 386, 35 S.Ct. 904, 59 L.Ed. 1355 [(1915).

26. The protection of the people's vote to be counted is lost if the Governor can come behind the election and reappoint ousted judges to the same courts – to decide the same controversies. Keep in mind, every winning vote by Democrats and for Justice Partida-Kipness was equally a vote against Republicans and against Justice Evans.

<sup>5</sup> Council, John. "Blue Wave' Hits Texas Judiciary as Democrats Win Seats on Four Appellate Courts." *Texas Lawyer*, 7 Nov. 2018,

www.law.com/texaslawyer/2018/11/07/blue-wave-hits-texas-judiciary-as-democrats-win-seats-on-four-appellate-courts/?slreturn=20200230204749. EXHIBIT D.

27. Apparently, a few other ousted appellate judges have gotten their jobs back too, with two getting promotional appointments to the Texas Supreme Court (Justices Busby and Bland).<sup>6</sup> Allowing ousted justices to simply be reappointed to consider controversies pending when they lost their reelection allows for entrenched political regimes to undermine the will and vote of the people, at will – and without recourse.

28. Granted, a judge who loses in an election may certainly apply to be appointed to serve the public further in other judicial settings. And nothing here suggests that the Governor does not have the authority to appoint or reappoint eligible jurists to judicial appointments of his or her choosing.

29. But to afford the protections guaranteed under the U.S. and State constitutions, such appointments must be balanced to be only for new conflicts which were not pending at the time the election was lost. Any litigant, such as Beasley, who had litigation pending when an appellate justice was defeated in an election should have, as a matter of right, a challenge to a reappointed justice to consider their appeals. Of course, however, if such recusal requests are not made, such a right would be voluntarily waived.

<sup>6</sup> Casady, Michelle. "Texas Justice Ousted In Election Gets His Old Job Back" *Law 360*, 1 Nov. 2019, Exhibit E.

30. Given his prior participation in this conflict, his election defeat and subsequent reappointment **to the same court**, Justice Evans should voluntarily recuse himself, and if he chooses not to, certify the question for the entire court to vote on and draft an opinion that Justice Evans, and other similar situated justices, should be recused if requested by a party that had an ongoing judicial proceeding when the election was lost.

# A Pattern of an Appearance of Bias

- 31. Furthermore, Justice David Evans and Peter Beasley have adverse history.
- 32. Beasley concedes that adverse rulings alone by a judge do not demonstrate bias, but when one or more sufficient other bases are raised, the judge hearing the motion may consider evidence of rulings when considering whether to grant the motion. Tex. R. Civ. P. 18b, "Comment to 2011 Change."
- 33. Beasley makes the necessary distinction and seeks recusal under (b)(1) "the judge's impartiality might reasonably be questioned" and not (b)(2), some demonstrated showing of bias which Beasley could not possibly show. When recusal is based on in-court proceedings, the alleged biased rulings or remarks must display a deep-seated favoritism or antagonism that would make a fair judgment impossible. *Ludlow v. DeBerry*, 959 S.W.2d 265, 281 (Tex. App.-Houston [14th Dist.] 1997, no pet.). And keep in mind, Justice Evans has

interacted with Beasley multiple times, but only as an appellate justice, where there have been no in-court proceedings. The two have likely never met.

34. Nonetheless, the appearance of bias is palpable, and can easily be discerned and readily appears in his multiple, authored opinions adverse to Beasley.

# Appearance of Bias #1 - Falsified Facts in an Opinion

- opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." Tex. R. App. P. 47.1. Furthermore, the courts of appeals have a duty to accurately determine the relevant substantive and procedural facts. Tex. Govt. Code § 22.220(c). But any experienced judge certainly must know, as the Supreme Court has pointed-out, judges are smartenough to "game the system". *See, In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210, 213 (Tex.2009) (orig.proceeding).
- 36. The 2018 Opinion by Justice Evans omitted the fact of Beasley's Rule 34.6(c) "partial record" appeal and instead presumed facts not in the record to issue an opinion adverse to Beasley. Such an omission falls short of the mandate of Rule 47.1, where mentioning the Rule 34.6 procedure was necessary *and essential* that Beasley succeed in his appeal. Otherwise, without providing a

record of a hearing, an appellate court is permitted to make presumptions in support of the judgment. Beasley's appeal would have been be dead in the water without him limiting the appeal, but Justice Evans assassinated Beasley's hopes for a fair hearing anyway by falsifying (by omission) the procedural facts.

- a. Justice Evans' 2018 opinion omits this vital, procedural fact.
- b. The court made presumptions adverse to Beasley.
- c. And Justice Evans provided no explanation why the court ignored the protections of Rule 34.6(c).
- 37. The Supreme Court criticized judges for "gaming the system" and for departing from the rules without any explanation. *Id.* The Columbia court reversed a trial judge's decision to overturn a jury's verdict without providing any explanation why. The Court reasoned doing so "detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury." *Columbia, Id.* at 214.
- 38. Certainly justices have their discretion and may word their opinions as they chose, but the rules do have limits, and the fact that Justice Evans completely omitted any mention of Rule 34.6(c), even after pointing out the omission in a

motion for rehearing, suggests an appearance of bias to game the system to intentionally rule against Beasley – a *pro se* litigant.

39. Justice Evans 2018 Opinion is symptomatic of the types of judgments from the 26 year-old Republican-dominated Dallas Court of Appeal that favor large institutions over individuals. But Texas have voted in a change.

# Appearance of Bias #2 – Unaddressed Issues in an Appeal

- 40. Likewise, Justice Evans' 2016 Opinion was also written to discredit Beasley. [EXHIBIT B]. There, the opinion portrayed Beasley to attempt an illogical, legal impossibility to appeal a voluntary dismissal with prejudice.
  - 41. The opinion, states as fact,

"As stated above, Beasley moved to dismiss his claims with prejudice" — which Beasley never said nor did.

42. In reality, as supported by affidavit, Beasley appealed an *involuntary* dismissal with prejudice which resulted from his attempt to **nonsuit without prejudice**, i.e. requesting a mistrial, which can be permitted and accepted late in a trial proceeding. *See*, *O'Brien v. Stanzel*, 603 S.W.2d 826, 828 (Tex.1980)(Circumstances may arise which, in a court's discretion, constitute grounds for a nonsuit late in a trial.) Yes, his request for a nonsuit was too late for

an absolute, nonsuit *without prejudice*, but at no time does the 2016 Opinion indicate Beasley clearly asked to dismiss his own lawsuit with prejudice.

43. As the court points out, Beasley's *pro se* failure to file a motion for new trial in that case would have been sufficient to affirm the judgment. As such, there was no need to cherry-pick Beasley's statements from the closing of the jury trial — except for the expressed purpose to discredit Beasley. The Justice Evans' 2016 Opinion had no need to portray Beasley in a negative light, except as a manifestation of the Justices' appearance of bias.

# Recusal under the Spirit of Rule 16a

- 44. By rule, a justice must recuse him or herself in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving *on another court* in which the proceeding was pending.
- 45. As stated earlier, Justices Busby and Bland lost in the Houston elections, but then were appointed to the Texas Supreme Court. There, Rule 16a would protect a Houston litigant from those justices deciding an appeal to the Texas Supreme Court of an issue those justices decided on the Houston court of appeals.
- 46. In the same spirit, the prohibition for a justice to decide a matter they already decided in <u>another court</u> should be extended and followed when a justice is reappointed to <u>the same court</u>. This sentiment appears codified in the

Government Code as a mandatory prohibition for Justice Evans to consider Beasley's appeal past his objection. Tex. Govt. Code § 75.551(d).

47. Beasley formally seeks the recusal of Justice David Evans.

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## Summary

- 48. Given the history of multiple distorted adverse opinions by Justice Evans against Beasley, his impartiality might reasonably questioned, justifying his recusal. Tex. R. Civ. P. 18b(1).
- 49. Justice Evans has had no involvement in this particular proceeding it having its genesis at a time Justice Evans was not a member of this court. The 5<sup>th</sup> District Court of Appeals has 13 justices, and to uphold the integrity of the process, this matter may easily be considered by the court without Justice Evans.
- 50. This motion is filed more than 21 days before submission, and it is not filed for delay.

## **PRAYER**

51. WHEREFORE, Beasley asks the Clerk of this Court to present the motions to Justice David Evans for his consideration. If Justice Evans does not grant the motion, Beasley requests a determination from the court en banc by majority vote.

Respectfully submitted, /s/Peter Beasley

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STATE OF TEXAS §
COUNTY OF DALLAS §

#### **DECLARATION OF PETER BEASLEY**

My first, middle, and last name is Peter Morell Beasley, my date of birth is September 20, 1958, and my address is 12915 Fall Manor, Dallas, Texas, 75243, United States. I declare under penalty of perjury that the foregoing statements are true and correct.

- 1. My name is Peter Beasley. I am over the age of twenty-one years, of sound mind, have never been convicted of any felony offense and I am fully competent and authorized to make this affidavit. I have personal knowledge of the facts stated herein and in the Motion to Recuse due to my personal involvement in the events and occurrences set forth, or are being made on information and belief.
  - 2. All of the facts stated herein are true.
  - 3. This motion is not for delay and not based solely on the rulings of the court.
  - 4. The attached documents are true copies of the documents they represent.

Executed in Dallas, State of Texas, on the 30th day of March, 2020.

The Bushy Declarant

# Certificate of Conference

I held a conference with opposing counsel on this matter and they are opposed.

<u>/s/Peter Beasley</u> Peter Beasley

# Certificate of Service

I hereby certify that on the 31<sup>sth</sup> day of March 2020, a true copy of the foregoing instrument was served on opposing counsel for the defendants by electronic means and the electronic transmissions were reported as complete.

<u>/s/Peter Beasley</u> Peter Beasley

# Exhibit A



# In The Court of Appeals Hifth District of Texas at Dallas

No. 05-17-01286-CV

PETER BEASLEY, Appellant V.

SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03141

### **MEMORANDUM OPINION**

Before Justices Myers, Evans, and Brown Opinion by Justice Evans

Appellant Peter Beasley appeals the award of attorney's fees in favor of appellee Society of Information Management, Dallas Area Chapter.<sup>1</sup> Beasley also asserts that the trial court lacked jurisdiction to award attorney's fees to SIM-DFW. Finally, Beasley asserts that the trial court judge should be disqualified or recused based upon certain rulings. We affirm.

#### BACKGROUND

SIM-DFW is a national, professional society of information technology (IT) leaders which seeks to connect senior level IT leaders with peers, provide opportunities for collaboration, and provide professional development. Beasley was a member of SIM-DFW until April 19, 2016 when he was removed from the chapter during a board of directors' meeting.

<sup>&</sup>lt;sup>1</sup> Appellee notes in its brief that its correct name is the Society *for* Information Management, not the Society of Information Management and that it is locally known as SIM-DFW. Accordingly, we refer to appellee as SIM-DFW.

In March 2016, Beasley filed a petition against SIM-DFW alleging claims for injunctive relief, breach of fiduciary duty, and for whistleblower protection under the Sarbanes-Oxley Act of 2002. On July 5, 2016, Beasley filed a motion for partial summary judgment requesting that the court sustain two of his declaratory judgment causes of action. Following the hearing held on August 15, 2016, the trial court denied this motion by order dated August 18, 2016.

On June 30, 2017, Beasley filed a sixth amended petition which limited his claims to claims for declaratory relief. Three causes of action sought declarations that: (1) the April 19, 2016 expulsion meeting was void; (2) the actions taken by the board following his expulsion are also void until ratified by Beasley; and (3) SIM-DFW's bylaws and articles of incorporation prohibit charitable donations of SIM-DFW's assets to non-members.

It appears that Beasley later filed a motion for no-evidence summary judgment and another motion for partial summary judgment. SIM-DFW also appears to have filed a traditional and no-evidence motion for summary judgment. A hearing for all of these summary judgment motions was set for October 16, 2017.<sup>2</sup> On October 5, 2017, however, plaintiff filed a notice of nonsuit and motion to dismiss all claims against all parties without prejudice.<sup>3</sup> On October 18, 2017, SIM-DFW filed a motion for sanctions which stated that it had incurred attorney's fees in excess of \$193,000 in this lawsuit. During the hearing on this motion, the trial court requested that the parties provide briefing on whether there was a live request for attorney's fees. The trial court specifically requested briefing as to whether this situation merited an award of attorney's fees if Beasley nonsuited to avoid an unfavorable ruling. Both parties submitted additional briefing and

<sup>&</sup>lt;sup>2</sup> Neither Beasley's nor SIM-DFW's motions for summary judgment were included in the clerk's record but the record does contain hearing notices for these motions.

<sup>&</sup>lt;sup>3</sup> The record also contains references to the fact that Beasley's responses to SIM-DFW's motions for summary judgment were due on October 5, 2017—the same day that he filed his nonsuit and motion to dismiss all claims.

a hearing was held on November 3, 2017.<sup>4</sup> Following the November 3 hearing, SIM-DFW's counsel submitted a proposed order and the affidavits of Robert A. Bragalone and Peter S. Vogel supporting the request for attorney's fees in excess of the amount the trial court awarded. By order dated November 3, 2017, the trial court granted SIM-DFW's request for attorney's fees and awarded it \$211,032.02. In addition, the trial court's order granting attorney's fees recited the following:

- 1. Plaintiff filed certain declaratory judgment claims on April 15, 2016.
- 2. Defendant moved for summary judgment on those claims.
- 3. The hearing on the motion for summary judgment was scheduled for October 12, 2017, making Plaintiff's response due on October 5, 2017.
- 4. On October 5, 2017, in lieu of filing a response to the motion for summary judgment, Plaintiff nonsuited his entire case.
- 5. The following factors support a finding that the nonsuit was filed to avoid an unfavorable ruling on the merits:
  - (a) the timing of the nonsuit;
  - (b) the strength of the motion for summary judgment;
  - (c) the failure to respond to the motion;
  - (d) the Plaintiff's prior litigation history, including a dismissal of all claims after resting his case during trial, which dismissal he then appealed to the Dallas Court of Appeals;<sup>5</sup> and
  - (e) Plaintiff's conduct during this very contentious litigation, including his conduct as a *pro se* party and as a Plaintiff in conjunction with five different appearances by lawyers, including the resources of eight (8) different judges in six (6) different courts.

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. On December 18, 2017, Beasley filed a first and second notice of appeal in which Beasley appeals

<sup>&</sup>lt;sup>4</sup> According to the briefing, there is no transcript for the November 3, 2017 hearing.

<sup>&</sup>lt;sup>5</sup> The reference to the case involving a dismissal of all claims is to an unrelated case titled *Beasley v. Richardson*, No. 05-15-01156-CV, 2016 WL 5110506 (Tex. App.—Dallas 2016, pet. denied).

from "the Final Judgment order entitled 'Order Granting Attorney's fees [sic] as Prevailing Party on Declaratory Judgment Claims' for Defendant."

#### **ANALYSIS**

## A. Summary Judgment and Award of Attorney's Fees

In the first issue, Beasley presents an argument which seeks for this Court to "correct a denied motion for summary judgment when the court erred, as a matter of law, by declaring the wrong party as having prevailed in support of an unnecessary, unreasonable, unjust and inequitable judgment for attorney fees." In four sub-issues, Beasley argues as follows: (1) the award of attorney's fees is erroneous where there is no showing it was reasonable, necessary, just or equitable and when Beasley should have prevailed on the declaratory judgment claim; (2) the expulsion was void, as a matter of law for violating due process, as the Board refused to tell Beasley the reasons he faced expulsion and did not provide proper notice, and Beasley was entitled to relief by summary judgment; (3) the expulsion was void, as a matter of law, as the Board did not have a quorum and Beasley was entitled to summary judgment; and (4) the finding of "who prevailed" is an issue of fact to have been tried by a jury.

Beasley argues that the "trial court entered a final judgment declaring SIM Dallas the prevailing party on Beasley's denied motion for summary judgment." The trial court's order granting attorney's fees, however, is unrelated to Beasley's July 5th motion for partial summary judgment. As stated in the order, the trial court declared SIM-DFW the prevailing party on Beasley's declaratory judgment claims and granted SIM-DFW an award of attorney's fees

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<sup>&</sup>lt;sup>6</sup> Although we construe pro se pleadings and briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with the applicable laws and rules of procedure. *In re* .E.B., 251 S.W.3d 211, 211–12 (Tex. App.—Dallas 2008, no pet.); *see also Gonzalez v.* ATR Const. LLC, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.) ("Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support his contention."). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *In re* .E.B., 251 S.W.3d at 212.

pursuant to section 37.009 of the Texas Civil Practice and Remedies Code. Accordingly, to the extent that Beasley is arguing that an award of attorney's fees to SIM-DFW under section 37.009 was improper, we address such arguments below in sections A(1) and (2).<sup>7</sup> To the extent that Beasley is reasserting summary judgment arguments which were previously denied by the trial court, we will not address such arguments in this opinion because Texas law generally prohibits appellate review of a trial court's interlocutory order denying a party's motion for summary judgment.<sup>8</sup> *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007) (recognizing that the denial of summary judgment is normally not appealable); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996) ("The general rule is that a denial of a summary judgment is not reviewable on appeal."). Here, Beasley's motion was a motion for partial summary judgment and it is not properly before us. *See id.* 

## 1) Attorney Fees (Sub-issue One)

In sub-issue one of the first issue, Beasley argues that the award of attorney's fees is erroneous because the award was unnecessary, unreasonable, unjust and inequitable. Here, Beasley argues that the fees awarded were not just or equitable because SIM-DFW could have reduced its fees by taking certain actions such as pursuing dismissal of Beasley's lawsuit prior to engaging protracted and costly discovery. Beasley also argues that the amount of fees requested by SIM-DFW's attorneys could not be considered reasonable because such an amount was not "reasonable and necessary in defense of 'who is a member of a voluntary association."

<sup>&</sup>lt;sup>7</sup> We address sub-issue one of the first issue to the extent Beasley is arguing that the award of attorney fees is erroneous in section A(1). We also address sub-issue four of the first issue as to whether "who prevailed" is an issue of fact to have been tried by a jury in section A(2).

<sup>&</sup>lt;sup>8</sup> For the reasons stated in the text, we will not address sub-issue one of the first issue to the extent that Beasley is arguing that he should have prevailed on the declaratory judgment claim. We will also not address sub-issues two or three of the first issue which are summary judgment arguments previously made by Beasley which are not properly before us.

<sup>&</sup>lt;sup>9</sup> Section 37.009 of the Texas Civil Practice & Remedies Code provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are just and equitable."

In response, SIM-DFW notes that the trial court requested, and it provided, affidavits of defense counsel supporting the request for attorney's fees. SIM-DFW noted that the affidavits detailed "the amount of fees incurred in the defense of Appellant's claims, segregate the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and address the factors in *Arthur Andersen v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997)." In response to Beasley's arguments about what SIM-DFW could have done to reduce its fees, SIM-DFW notes that the trial court "relied on the procedural history of the case and Appellant's litigation history as an experienced *pro se* litigant who abuses the courts, wastes significant judicial resources, and uses lawsuits as a means to 'negotiate' private and non-justiciable matters to his satisfaction." SIM-DFW further asserts that because there is no reporter's record for the November 3, 2017 hearing, this Court must presume that the evidence supports the trial court's judgment.

An award of attorney's fees under the Declaratory Judgments Act is reviewed for abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision. *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2007, no pet.). It is an abuse of discretion for the trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet*, 972 S.W.2d at 21. In addition, we review the evidence in the light most favorable to the trial court's ruling, indulging every presumption in its favor. *Feldman v. PMG LLP*, 438 S.W.3d 678, 686 (Tex. App.—Houston [1st Dist.] 2014, no pet).

<sup>&</sup>lt;sup>10</sup> As noted above, the trial court considered both Beasley's prior litigation history and his conduct during this litigation when awarding SIM-DFW its attorney's fees and costs in defense of the declaratory judgment claims.

The Declaratory Judgments Act imposes four limitations on the court's discretion to award attorney's fees. *Bocquet*, 972 S.W.2d at 21. The first two limitations are that the fees must be reasonable and necessary and these are fact questions for the trier of fact's determination. 

See id. The other two limitations on attorney's fees are that they must be equitable and just and these are questions of law. Feldman, 438 S.W.3d at 686.

In regard to the reasonableness and necessity of the fees, a factfinder should consider the following facts: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular appointment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainly of the collection before the legal services have been rendered. See Co., 945 S.W2d at 818. In this case, SIM-DFW submitted the affidavits Arthur Andersen following the hearing which addressed the amount of fees incurred in the defense of Beasley's claims, segregated the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and addressed the Arthur Andersen factors. Further, we note that we do not have a reporter's record of the November 3, 2017 hearing to review. Without this record, we are unable to evaluate what evidence or testimony was relied on by the trial court during the hearing and we must presume that the evidence supports the trial court's judgment. See Favaloro v. Comm'n for Lawyer Discipline, 994 S.W.2d 815, 821 (Tex. App.—Dallas 1999, pet. stricken) ("If the appellant fails to bring forward a complete record, the court will conclude appellant has

<sup>&</sup>lt;sup>11</sup> We address the issue of why a jury did not determine the amount of fees in section A(2), *infra*.

waived the points of error dependent on the state of the evidence."); *Rush v. Barrios*, 56 S.W.3d 88, 96 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("No record was made of the hearing on the motion for fee forfeiture, and we must support the judgment of the trial court on any legal theory applicable to the case."). Finally, we note that the trial court did not award SIM-DFW the full amount of the fees it requested. Based on our review of the record, we cannot conclude that the trial court abused its discretion in determining that attorney's fees in the amount of \$211,032.02 were reasonable and necessary.

Under section 37.009, a trial court may exercise its discretion to award attorney's fees to the prevailing party, the nonprevailing party, or neither. Feldman, 438 S.W.3d at 685. Here, the trial court determined that SIM-DFW was the prevailing party on Beasley's declaratory judgment claims and was entitled to an award of attorney's because Beasley had filed a nonsuit to avoid an unfavorable ruling. Epps v. Fowler, 351 S.W.3d 862, 870(Tex. 2011). (holding that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits). In its order, the trial court stated that it considered the pleadings, evidence, and arguments of counsel and listed numerous factors in support of its decision to award fees, such as Beasley's prior litigation history, the timing of the nonsuit, and Beasley's conduct in this litigation. We note that the determination of whether an award of attorney's fees would be equitable or just is not susceptible to direct proof but instead is a matter of fairness in light of all the circumstances. See Anglo-Dutch Petroleum Int'l v. Greenberg Peden, P.C., 522 S.W.3d 471, 494 (Tex. App.— Houston [14th Dist.], pet. denied). Under the circumstances described above, we conclude that the trial court did not abuse its discretion in determining that an award of fees to SIM-DFW was equitable and just.

Accordingly, we overrule Beasley's sub-issue one of the first issue.

### 2. Waiver of Jury Trial (Sub-issue Four)

In sub-issue four of the first issue, Beasley argues that all questions of fact should be decided by a jury and that his declaratory judgment action "was entitled to trial by a jury." In regard to this argument, we note that there was no issue of fact for a jury to determine following Beasley's nonsuit of his declaratory judgment claims. Beasley then argues that the "determination of the amount of fees that are reasonable and necessary is a question of fact for the jury." We agree with Beasley's assertion that the reasonableness and necessity of fees is a fact issue. Bocquet, 972 S.W.2d at 21. Beasley, however, has not set forth any evidence that he raised an objection to the trial court, not a jury, making this determination. As an appellate court, we review a trial court's ruling or an objection to its refusal to rule. See Tex. R. App. P. 33.1(a)(2); Texas Dep't of Protective & Regulatory Servs. v. Sherry, 46 S.W.3d 857, 861 (Tex.2001) (constitutional claim on appeal in paternity suit waived by failure to raise complaint at trial) (citing *Dreyer v*. Greene, 871 S.W.2d 697, 698 (Tex.1993)); uintana v. CrossFit Dallas, L.L.C., 347 S.W.3d 445, 448–49 (Tex. App.—Dallas 2011, no pet.). "Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds." In re B.L.D., 113 S.W.3d 340, 350 (Tex. 2003). This is called preservation of error and requires that "a party's argument on appeal must comport with its argument in the trial court." napp v. Wilson . ones Mem'l Hosp., 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.); see TEX. R. APP. P. 33.1(a)(1). If an issue has not been preserved for appeal, we should not address it because nothing is presented for our review. See In re R.B., 200 S.W.3d 311, 317 (Tex. App.—Dallas 2006, pet. denied) (preservation of error requires a timely objection in the absence of which nothing is presented for appellate court review).

Here, Beasley's supplemental brief, as requested by the trial court, did not contain any objection to the trial court determining the reasonableness or necessity of attorney's fees. <sup>12</sup> Further, there is no reporter's record of the November 3, 2017 hearing so there is no record that any objection was made and ruled upon by the trial court. Accordingly, as Beasley cannot demonstrate that error was preserved, he has waived his right to complain on appeal that the trial court denied his right to a jury on the issue of reasonableness and necessity of fees. *See Sunwest Reliance Acquisitions Group v. Provident Nat'l Assurance Co.*, 875 S.W.2d 385, 387 (Tex. App.—Dallas 1993, no pet.) (holding that "when a party has perfected its right to a jury trial in accordance with rule 216 but the trial court instead proceeds to trial without a jury, the party must, in order to preserve any error by the trial court in doing so, either object on the record to the trial court's action or indicate affirmatively in the record it intends to stand on its perfected right to a jury trial."). Accordingly, in this instance, the trial court was the proper party to decide the issue of attorney fees because Beasley waived his right to have a jury decide this issue. For all the reasons described above, we overrule Beasley's sub-issue four of the first issue.

## B. Lack of Jurisdiction to Award Attorney's Fees

In Beasley's second issue, he argues that the trial court lacked jurisdiction to have a nonsuited defendant file a motion for attorney's fees and subsequently grant an award of fees which had not been requested before the nonsuit. Rule 162 provides that a dismissal "under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." Tex. R. Civ. P. 162.

<sup>&</sup>lt;sup>12</sup> In his objections to the Bragalone and Vogel (SIM-DFW's trial court attorneys) affidavits, Beasley did make the following objection: "Plaintiff further objects to the use of the evidence as a denial of due process and plaintiff's right to trial by jury." This objection, however, was filed after the hearing took place on November 3, 2017.

Both parties concede that SIM-DFW's answer contained a request for attorney's fees in its conclusion and prayer.<sup>13</sup> To the extent that Beasley is contesting the timeliness of SIM-DFW's request for attorney's fees, we find Beasley's argument unpersuasive. The Texas Supreme Court has decided that "the trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit" while the court retains its plenary power. See Travelers Ins. Co. v. oachim, 315 S.W.3d 860, 863 (Tex. 2010); see also Scott White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 (Tex. 1996) ("Rule 162 merely acknowledges that a nonsuit does not affect the trial court's authority to act on a pending sanctions motion; it does not purport to limit the trial court's power to act on motions filed after a nonsuit. In this case, the trial court imposed sanctions while it retained plenary jurisdiction. Nothing in Rule 162 or any previous decision of this Court deprives a trial court of this power."). Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by the costs it incurred in defending baseless pleadings. *Travelers* Ins. Co., 315 S.W.3d at 864. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting the aggrieved party. *Id.* at 864–65. The same analysis applies to a motion for attorney's fees filed after a nonsuit. See Proler v. City of Houston, 499 S.W.3d 12, 15 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("Rule 162 'permits the trial court to hold hearings and enter orders affecting ... attorney's fees ... even after notice of nonsuit is filed."").

Here, the trial court elected not to award sanctions but requested that the parties provide briefing on the issue of attorney's fees. The trial court's order concluded that Beasley nonsuited his case to avoid an unfavorable ruling on the merits and, following a hearing, the trial court elected to award attorney's fees pursuant to section 37.009 of the Texas Civil Practice and Remedies Code.

<sup>&</sup>lt;sup>13</sup> The clerk's record does not contain a copy of SIM-DFW's answer.

Further, all of these actions took place within the trial court's plenary jurisdiction.<sup>14</sup> Accordingly, we cannot conclude that the request for attorney's fees was untimely.

Beasley also argues that the attorney's fees should not be allowed because "a trial judge is prohibited from imposing sanctions, veiled as attorney's fees, against a nonsuiting party on the court's own motion." In support of this assertion, Beasley cites to *Dean v. Riser*, 240 F.3d 505, 508 (5th Cir. 2001). The *Dean* case, however, addresses the impact of a voluntary dismissal of a civil rights case on whether defendant was entitled to attorney's fees as a prevailing party under 42 U.S.C. § 1983. *Id.* at 507. That court ultimately remanded the case to the trial court for a determination of whether plaintiff withdrew to avoid an unfavorable judgment on the merits. *Id.* at 511. As the *Dean* case addresses attorney's fees under a federal statute, we do not find it relevant or persuasive. We note, however, that the trial court in this case did conclude that Beasley filed a nonsuit to avoid an unfavorable ruling on the merits and, as described above, awarded SIM-DFW its attorney's fees in accordance with section 37.009 of the Texas Civil Practice and Remedies Code.

For all the reasons described above, we overrule Beasley's second issue.

## C. Disqualification and Recusal

In his third issue, Beasley argues that the trial court judge should have been disqualified or have recused herself for advocating for one party over another. Beasley specifically argues that the trial judge should have been recused or disqualified because she was not impartial and acted as counsel for SIM-DFW.

<sup>&</sup>lt;sup>14</sup> The order of dismissal was signed on October 9, 2017. Therefore, the trial court's plenary jurisdiction expired thirty days after October 9, 2017. *See In re Bennett*, 960 S.W.35, 38 (Tex. 1997) ("However, the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court's plenary power expires.").

#### 1) Additional facts

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. Judge Moore declined to recuse herself and requested that another judge be assigned to hear the motion. On November 22, 2017, the presiding judge of the judicial region signed an order denying plaintiff's motion to disqualify and recuse judge which provided as follows:

After considering the evidence, the undersigned finds the motion should be denied. Without limitation, the motion is untimely because Plaintiff's complaints and evidence show that the rulings and actions of the judge for which he seeks recusal begin in January of 2017 and continue throughout 2017. Yet Plaintiff did not file a recusal motion until November 20, 2017. While one of Plaintiff's assertions is that the judge became an advocate for Defendant at a sanctions hearing, such complaint, again, is lodged after many months of rulings and actions Plaintiff contends support recusal; the judge's November 3 ruling on sanctions also is grounded in the history of the case.

\*\*\*

To the extent Plaintiff seeks disqualification of the judge, he has presented no valid legal or factual basis for disqualification.

## 2) Analysis

Beasley argues that the trial court judge should have been disqualified pursuant to the Texas Constitution and the Texas Rules of Civil Procedure because she acted as counsel in the case. Beasley specifically argues that the trial judge "conducted legal research" and "advocated" that SIM-DFW could pursue attorney's fees. Here, however, there was no assertion that the trial judge has served as a lawyer in the matter in controversy. Before a judge is disqualified on this ground, "it is necessary that the judge acted as counsel for some of the parties in [the] suit before him in some proceeding in which the issues were the same as in the case before him." *In re* 

<sup>&</sup>lt;sup>15</sup> See TEX. CONST. art. V, § 11 ("No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."); TEX. R. CIV. P. 18b(a)(1) ("A judge must disqualify in any proceeding in which: the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . ").

O'Connor, 92 S.W.3d 446, 448 (Tex. 2002). Beasley's argument that the trial judge acted "as

counsel" in this case because the trial judge conducted independent research and requested further

briefing or expressed her thoughts at hearings does not fall within the scope of the disqualification

grounds of either the Constitution or the Texas Rules of Civil Procedure and, accordingly, we

overrule this argument.

Beasley also argues that the trial court should have recused herself because of her bias and

prejudice against him. The Texas Rules of Civil Procedure provide that a judge must recuse in

any proceeding in which the judge's "impartiality might reasonably be questioned" or if the judge

has a "personal bias or prejudice concerning the subject matter of a party." See TEX. R. CIV. P.

18b(b)(1)-(2). We review an order denying a motion to recuse for abuse of discretion. *Drake v*.

Walker, 529 S.W.3d 516, 528 (Tex. App.—Dallas 2017, no pet.). The movant bears the burden

of proving recusal is warranted, and the burden is met only through a showing of bias or

impartiality to such an extent that the movant was deprived of a fair trial. Id. Further, bias by an

adjudicator is not lightly established and judicial rulings alone almost never constitute a valid basis

for a motion to recuse based on bias or partiality. *Id.* Here, Beasley argues that the trial judge was

biased because she raised the vexatious litigant statute during a hearing, requested additional

briefing on the issue of attorney's fees, and subsequently awarded a "large, flagrant attorney fees

award against Beasley." We conclude that Beasley did not meet his burden to establish bias and

overrule his third issue.

**CONCLUSION** 

On the record of this case, we affirm the trial court's judgment.

/David Evans/ DAVID EVANS JUSTICE

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# Court of Appeals Fifth District of Texas at Dallas

## **JUDGMENT**

PETER BEASLEY, Appellant

No. 05-17-01286-CV V.

SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, Appellee On Appeal from the 162nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-16-03141. Opinion delivered by Justice Evans. Justices Myers and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, recover its costs of this appeal from appellant PETER BEASLEY.

Judgment entered this 1st day of November, 2018.

# Exhibit B



# In The Court of Appeals Hifth District of Texas at Dallas

No. 05-15-01156-CV

# PETER BEASLEY, Appellant V. SEABRUM RICHARDSON AND LAMONT ALDRIDGE, Appellees

On Appeal from the 192nd Judicial District Court Dallas County, Texas Trial Court Cause No. DC-13-13433

## **MEMORANDUM OPINION**

Before Justices Lang, Myers, and Evans Opinion by Justice Evans

Appellant Peter Beasley asserts that the trial court committed error by dismissing the case with prejudice. Beasley also asserts that the trial court abused its discretion for numerous reasons including, but not limited to, failing to grant a hearing on a temporary restraining order, refusing to award attorneys' fees, and failing to grant a continuance. We affirm.

## **BACKGROUND**

On November 12, 2013, Beasley filed a lawsuit against Richardson. Beasley added Aldridge as a defendant in his second amended petition.

The lawsuit proceeded to trial on June 8, 2015, and all parties appeared pro se before the trial court. After a day and a half, Beasley concluded his presentation of evidence to the jury.

After the lunch break on June 9, 2015, and before the return of the jury, the following exchange took place:

[Court]: Do I have any motions or anything the lawyers -- or the parties

need to visit with me about?

[Beasley]: I would like to nonsuit also.

[Court]: Who do you want to nonsuit?

[Beasley]: My entire case. I -- I understand they have a pending case and I

know that doesn't do anything against those. I'm willing to do

that.

[Court]: Is this all you wanted do [sic]?

[Beasley]: No, sir.

[Court]: Is drag people through this process and then finally say, well, I'm

through?

\*\*\*

[Court]: You have already rested your case and if you -- it's too late to

nonsuit. If you want to dismiss your lawsuit, you can dismiss your

lawsuit with prejudice.

[Beasley]: I understand that. That is what I mean, I guess. Whatever that

process is.

[Court]: You have already rested.

[Beasley]: Yes. I understand.

[Aldridge]: Your Honor, I motion the Court for the directed verdict. Mr.

Beasley --

[Court]: Well, he's already dismissed his case. He's dismissed everything

against you, after he rested, though.

\*\*\*

[Court]: This poor Jury had to sit here for a day and a half listening to you

just vent, I guess. Because your life didn't work out very well on whatever birthday it was. I accept your nonsuit. Don, go get the

Jury.

[Court]: Mr. Beasley, I just truly don't understand it. And I think I just --

I'm inviting you to give some explanation as to what you had in

mind, have in mind.

[Beasley]: Yes, Your Honor.

[Court]: How we got to this point?

[Beasley]: Yes, Your Honor.

[Court]: We're on the record, so.

[Beasley]: Yes.

[Court]: I just want you to be aware of that.

[Beasley]: I understand.

[Court]: I'm not trying to trick you, either.

[Beasley]: I appreciate the opportunity, Your Honor. I truly do. I felt that at

some point I had to try and win or lose. It seemed that if I nonsuited or gave in, it becomes frivolous, as I'm doing now. I had to try and prove my case and I can't find my pieces of paper. I'm disorganized. I'm no [sic] sleep. I -- I look horrible, fumbling. So I wasn't able to do it. I felt probably when Mr. Richardson started incurring attorney's fees, I probably should

have either quit because there's now going to be real costs in this, or eventually I think there was a walk away option. But, I thought my claims have merit, but I cannot -- it's too overwhelming for me. I'm not trying to make excuses. I'm just -- I can't. I haven't

been able to do it. I thought I could come in and try to show there's some merit here. I have horribly not been able to do that. And Mr. Richardson said there's an internal power struggle and that email, I'm sick of emails. And I should not have -- probably

at the argument stage with Mr. Richardson, that was a bad time for us both. That was probably -- just listening to, you walking back through that, I should have withdrawn from it then instead of still going forward. Maybe he should have been before I paid the other

2600. A lot of places I made mistakes and should have gotten out of it. And at some point, got dug in. One, if I quit, it's just frivolous and so I had to come in and try win and I just to [sic]

couldn't do it.

[Court]:

Welcome back, everybody. On the record, following -- everybody can be seated. Thank you. Following the evidence that you heard, ladies and gentlemen, and following Mr. Beasley resting, passing the case to the Defendants, he came back here after lunch and Mr. Beasley has stood up and he has filed a motion to dismiss his lawsuit. So he's dismissed his lawsuit. And there were counter claims pending, but other than the ones dealing with questions for the Court, that being abuse of process and frivolous lawsuit and bad faith lawsuits. Are you withdrawing the other ones, Mr.

Aldridge?

[Aldridge]: Yes, Your Honor.

[Richardson]: Yes.

[Court]: Is that right?

[Aldridge]: Yes, Your Honor.

On June 12, 2015, the trial court entered an order of dismissal with prejudice of all of Beasley's causes of actions and claims against Richardson and Aldridge. On August 20, 2015, the trial court signed a final judgment which denied Richardson's motion for sanctions and counterclaims and assessed costs incurred against the party incurring same. On September 21, 2015, Beasley filed a notice of appeal.

#### **ANALYSIS**

Although we construe pro se pleadings and briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with the applicable laws and rules of procedure. *In re N.E.B.*, 251 S.W.3d 211, 211–12 (Tex. App.—Dallas 2008, no pet.); *see also Gonzalez v. VATR Const. LLC*, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.) ("Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support his contention."). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *In re N.E.B.*, 251 S.W.3d at 212.

As stated above, Beasley moved to dismiss his claims with prejudice. The trial court

granted his motion and dismissed the claims with prejudice. Although Beasley neither objected

to the dismissal nor moved for a new trial following the dismissal, he filed an appeal asserting,

among other things, that the trial court erred by dismissing his case. We disagree.

Error in dismissing a case with prejudice cannot be raised for the first time on appeal and

must be presented to the trial court. See El Paso Pipe & Supply Co. v. Mountain States Leasing,

Inc., 617 S.W.2d 189, 190 (Tex. 1981); Bird v. Kornman, 152 S.W.3d 154, 161 (Tex. App.—

Dallas 2004, pet. denied). To preserve a complaint of error in a judgment for appellate review,

Beasley was required to inform the trial court of his objection by a post-judgment motion to

amend or correct the judgment or a motion for new trial. Bird, 152 S.W.3d at 161; Arthur's

Garage, Inc. v. Racal-Chubb Sec. Sys., Inc., 997 S.W.2d 803, 816 (Tex. App.—Dallas 2004, no

pet.). As Beasley failed to preserve his objection to the judgment by filing a post-judgment

motion or a motion for new trial, we conclude that the trial court did not err by dismissing the

case with prejudice. As we have disposed of this appeal as stated above, it is unnecessary to

address any of the additional issues raised by Beasley in his brief.

**CONCLUSION** 

We resolve Beasley's issues against him and affirm the trial court's judgment.

/David Evans/ DAVID EVANS

JUSTICE

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# Court of Appeals Fifth District of Texas at Dallas

#### **JUDGMENT**

PETER BEASLEY, Appellant

No. 05-15-01156-CV V.

SEABRUM RICHARDSON AND LAMONT ALDRIDGE, Appellees

On Appeal from the 192nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-13-13433. Opinion delivered by Justice Evans. Justices Lang and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees SEABRUM RICHARDSON AND LAMONT ALDRIDGE recover their costs of this appeal from appellant PETER BEASLEY.

Judgment entered this 20th day of September, 2016.

# Exhibit C

#### No. 19-0041

## In the Supreme Court of Texas

Peter Beasley,

Petitioner,

VS.

# Society of Information Management, Dallas Area Chapter, Respondent.

On Petition for Review from the Fifth District Court of Appeals at Dallas, Texas No. 05-17-01286-CV

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#### Statement of the Case

Nature of the Case Declaratory judgment.

Trial Court Hon. Maricela Moore, 162nd Judicial

District Court, Dallas County.

Trial Court's Disposition After plaintiff's non-suit, awarded

attorney's fees of \$211,032.02 to defendant under declaratory-judgments act. (App. 2;

C.R. 2156-58).

Court of Appeals Affirmed—Fifth Court of Appeals (Dallas).

Opinion by Justice Evans, joined by Justices

Myers and Brown.

Beasley v. Society of Information Mgmt., No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed)

(mem. op.) (App. 1).

## Statement of Jurisdiction

This Court has jurisdiction because this petition presents important questions of law. Tex. Gov't Code Ann. § 22.001 (West Supp. 2017).

#### **Issues Presented**

1. When an appellant properly orders a partial reporter's record under rule 34.6(c), can the court of appeals presume that an unrequested transcript supports the judgment?

2. To recover attorney's fees from a nonsuiting plaintiff by fee shifting on the plaintiff's claim for relief, must the defendant plead for those fees before the nonsuit? If so, is a boilerplate prayer for "attorney's fees . . . and further general relief" in a general-denial answer sufficient?

#### **Reasons to Grant Review**

This petition presents two important procedural questions. First, what presumption about the record is permissible when an appellant requests a partial reporter's record under appellate rule 34.6(c)? Second, after a plaintiff nonsuits his claim, can the defendant recover attorney's fees by feeshifting without asserting any claim for fees before the nonsuit? Each issue has important implications for Texas civil and appellate practice.

In a series of decisions culminating this year in *Rohrmoos*,<sup>1</sup> this Court has made clear that an award of attorney's fees under a fee-shifting provision must be supported by meaningful evidence—the old "nudge-and-a-wink" conclusory testimony won't cut it anymore. Yet here, the trial court awarded more than \$200,000 in attorney's fees without any evidentiary hearing and based solely on the lawyers' old-style conclusory affidavits.

In rejecting Beasley's sufficiency challenge to that award, the court of appeals presumed that an unordered transcript supported the judgment. But Beasley invoked and explicitly relied upon the partial-record provision of rule 34.6(c). If that rule means anything, it is that an appellate court *cannot* presume that an unordered transcript supports the judgment. Indeed, rule

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<sup>&</sup>lt;sup>1</sup> Rohrmoos Venture v. UTSW DVA Healthcare, LLP, \_\_\_\_ S.W.3d \_\_\_, 2019 WL 1873428, at \*19-20 (Tex. Apr. 26, 2019).

34.6(c)(4) sweeps aside the normal presumption and imposes the opposite one—that an unordered transcript is *not* relevant to the appeal.

Independently, this Court has held that a party can file a motion for sanctions after a nonsuit so long as the trial court retains plenary power. Here, the court of appeals expanded that rule to embrace an after-filed claim for attorney's fees. But a nonsuit nullifies all controversies related to the plaintiff's claim other than a defendant's *pending* claim for affirmative relief.

Beasley sued the Society for Information Management, Dallas Area Chapter for declaratory judgment. When Beasley nonsuited his claims, the Society had no counterclaim or motion for attorney's fees. But the trial court—raising the matter *sua sponte*—nevertheless awarded the Society more than \$200,000 in fees on Beasley's declaratory-judgment claim.

The court of appeals affirmed, holding that a claim for fees need not be filed before a nonsuit and, in any event, the Society's boilerplate request for attorney's fees in the prayer of its answer supported the award. The court rejected Beasley's sufficiency challenge, applying the presumption that a missing transcript supports the judgment. But Beasley's invocation of rule 34.6(c) should have barred this presumption.

This Court should grant review to clarify that—

- an appellate court may not apply the presumption concerning missing transcripts when the appellant properly invokes rule 34.6(c), and
- a claim for attorney's fees based on fee-shifting under the plaintiff's claim must be filed before a nonsuit.

#### **Statement of Facts**

The court of appeals omitted materials facts in its opinion. Most notably, it never mentioned Beasley's invocation of rule 34.6(c).

Peter Beasley sued the Society for Information Management, Dallas Area Chapter<sup>2</sup> for whistleblower retaliation and breach of fiduciary duty seeking declaratory judgment, injunctive relief, and damages.<sup>3</sup>

The Society's answer is not part of the record. But the Society concedes that its only "request" for fees was the following prayer at the end of its general-denial answer:

For the foregoing reasons, Defendants pray that Plaintiff take nothing by way of his claims, that Defendants recover their attorneys' fees, costs and expenses as allowed by law, and for such other and further general relief, at law or in equity, as the ends of justice requires and to which the evidence may show it justly entitled.<sup>4</sup>

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<sup>&</sup>lt;sup>2</sup> The Society has been referred to throughout the litigation as the Society *of* Information Management rather than by its correct name, the Society *for* Information Management.

<sup>&</sup>lt;sup>3</sup> C.R. 9-36, 37-69, 573-83. Beasley also filed a jury demand. C.R. 464.

<sup>&</sup>lt;sup>4</sup> C.R. 2137; Appellee's Brief at 15.

### Non-suit and judgment

The Society filed a motion for summary judgment.<sup>5</sup> Before the hearing of that motion, Beasley filed a notice of nonsuit.<sup>6</sup> At that time, the Society had not asserted any counterclaim or filed any motion for sanctions or attorney's fees.<sup>7</sup> The trial court signed an order dismissing the lawsuit.<sup>8</sup>

Two weeks later, the Society filed a motion for sanctions. During the hearing of that motion, the trial court expressed its opinion that sanctions were unwarranted. But the trial court raised the possibility of awarding the Society fees under the declaratory-judgments act based on Beasley's possible use of the nonsuit to avoid an unfavorable ruling. The trial court cited *Epps v. Fowler* as authorizing such an award. When Beasley's counsel argued the award would be unsupported by any pleading, the trial court requested briefing on whether the Society had any pending pleading for fees.

<sup>&</sup>lt;sup>5</sup> C.R. 16, 1173-77. The motions are not in the appellate record.

<sup>&</sup>lt;sup>6</sup> C.R. 1176–77.

<sup>&</sup>lt;sup>7</sup> C.R. 9-28.

<sup>&</sup>lt;sup>8</sup> C.R. 9, 28. The order in not included in the appellate record but is reflected on the trial court's docket sheet.

<sup>&</sup>lt;sup>9</sup> C.R. 1178–1276.

<sup>&</sup>lt;sup>10</sup> 4 R.R. 13.

<sup>&</sup>lt;sup>11</sup> 4 R.R. 36; see also 4 R.R. 39.

<sup>&</sup>lt;sup>12</sup> 351 S.W.3d 862 (Tex. 2011).

<sup>&</sup>lt;sup>13</sup> 4 R.R. 39.

<sup>&</sup>lt;sup>14</sup> 4 R.R. 38–40.

That evening, the Society supplemented its sanctions motion to request attorney's fees under the declaratory-judgments act. But the Society ignored the trial court's question; it did not cite any pleading for fees. <sup>15</sup> Beasley filed a response arguing the Society had no pleading to support any fee award. <sup>16</sup>

On November 3, 2017, the trial court conducted another hearing on the Society's fee request. The transcript of that hearing is not part of the appellate record (more on that to come). But the notice of hearing was for "continued argument" on the motion for sanctions and availability of fees.<sup>17</sup>

After the hearing, the Society's lawyer sent a letter to the trial court stating that counsel had "conferred about the amount of fees but did not reach an agreement." The Society tendered affidavits from two of its lawyers concerning attorney's fees. One of the lawyers included a paragraph in his affidavit describing general categories of services that he performed (for example, "review[ing] pleadings and motions filed by Peter

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<sup>&</sup>lt;sup>15</sup> C.R. 2118–2128.

<sup>&</sup>lt;sup>16</sup> C.R. 2137.

<sup>&</sup>lt;sup>17</sup> C.R. 2129-30.

<sup>&</sup>lt;sup>18</sup> C R 2140

<sup>&</sup>lt;sup>19</sup> C.R. 2142-55.

Beasley").<sup>20</sup> But neither lawyer detailed the services performed or time spent on particular tasks. And neither of them tendered their invoices.<sup>21</sup>

Beasley objected to the lawyers' affidavits as hearsay, objected to the trial court's failure to conduct a jury trial on fees, and protested that "[n]o agreement was made among the parties to prove attorney's fees in this manner."<sup>22</sup>

The trial court denied the motion for sanctions<sup>23</sup> but signed an order awarding the Society attorney's fees of \$211,032.02 as a prevailing party under the declaratory-judgments act.<sup>24</sup>

The court of appeals affirms based on a missing transcript—ignoring Beasley's invocation of rule 34.6(c)

Beasley filed notice of this appeal,<sup>25</sup> requesting a partial reporter's record under rule 34.6(c) of the rules of appellate procedure. As required by that rule, he listed his appellate points in the request.<sup>26</sup> Neither Beasley nor the Society requested any transcript of the November 3 hearing.<sup>27</sup>

<sup>21</sup> C.R. 2142–55.

<sup>&</sup>lt;sup>20</sup> C.R. 2149.

<sup>&</sup>lt;sup>22</sup> C.R. 2166.

<sup>&</sup>lt;sup>23</sup> C.R. 2169.

<sup>&</sup>lt;sup>24</sup> App. 1; C.R. 2156–58.

<sup>&</sup>lt;sup>25</sup> C.R. 2170-71, 2651.

<sup>&</sup>lt;sup>26</sup> App. 3; C.R. 2661-63.

<sup>&</sup>lt;sup>27</sup> C.R. 35, App. 3; 2661–63.

On appeal, among other issues, Beasley argued that: (1) the fee award was improper due to the lack of supporting evidence, and (2) the Society lacked any pleading to support the award.<sup>28</sup>

In its brief, the Society acknowledged that its lawyers' affidavits were the only evidence of fees.<sup>29</sup> But the Society argued the court of appeals had to presume the unrequested November 3 transcript supported the trial court's judgment.<sup>30</sup> In reply, Beasley—

- cited his "limited appeal" under rule 34.6(c),
- argued the Society never exercised its prerogative under that rule to order the transcript, and
- invoked the mandatory presumption under rule 34.6(c) requiring the appellate court "to presume nothing omitted from the record [was] relevant . . . . ."<sup>31</sup>

The court of appeals affirmed. *Beasley v. Society of Information Mgmt.*, No. 05-17-01286-CV, 2018 WL 5725245 (Tex. App.—Dallas Nov. 1, 2018, pet. filed) (mem. op.). 32

With regard to the evidence supporting the reasonableness and necessity of the fees, the court—without mentioning rule 34.6(c) or

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<sup>&</sup>lt;sup>28</sup> Appellant's Brief at 19, 30; Appellant's Reply Brief at 12.

<sup>&</sup>lt;sup>29</sup> Appellees' Brief at 18.

<sup>&</sup>lt;sup>30</sup> Appellees' Brief at 19.

<sup>&</sup>lt;sup>31</sup> Appellant's Reply Brief at 13.

<sup>&</sup>lt;sup>32</sup> App. 1.

Beasley's request for a partial record—held that the unrequested transcript required it to "presume that the evidence [from the hearing] supports the trial court's judgment." *Id.* at \*4 (citations omitted). The court also pointed to the missing transcript in concluding that Beasley could not establish preservation of any error in denying him a jury trial on fees. *Id.* at \*6.

As to the pleadings, the court held that: (1) the Society's general prayer for fees supported the award, and (2) the Society's request did not need to be pending before Beasley's non-suit anyway. *Id.* at \*6.

### **Summary of the Argument**

This Court should grant review to clarify two important procedural issues.

First, when an appellant properly orders a partial record under rule 34.6(c), the appellate court must presume that partial record constitutes the entire record relevant to the stated points on appeal—even when those points include a sufficiency challenge. This mandatory presumption precludes application of the otherwise-applicable general presumption that an omitted portion of the record supports the judgment.

Second, a defendant seeking attorney's fees as a result of fee-shifting under the plaintiff's claim for relief must plead for those fees before the

plaintiff's nonsuit. And a general reference to fees in the prayer of a generaldenial answer is not sufficient to do so.

#### Argument

- 1. This Court should grant review to clarify that invocation of rule 34.6(c) bars the otherwise-applicable presumption that an unrequested transcript supports the judgment.
  - A. Absent the presumption, the fee award lacks sufficient supporting evidence.

The declaratory-judgments act permits the recovery of attorney's fees. "When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing the fees are reasonable and necessary." In re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding) (citations omitted). Reasonableness and necessity are issues for the trier of fact. See Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998) (citations omitted).

The trial court awarded more than \$200,000 in attorney's fees without any evidentiary hearing or trial; the Society's lawyers simply filed affidavits concerning the fees.<sup>33</sup> Beasley never agreed to this abbreviated procedure and objected that he was entitled to a jury trial on the issue.<sup>34</sup>

<sup>&</sup>lt;sup>33</sup> C.R. 2142-55.

<sup>&</sup>lt;sup>34</sup> C.R. 2166.

Even had Beasley agreed to proving fees by affidavit, the affidavits here were insufficient under this Court's recent decision in *Rohrmoos Venture*v. UTSW DVA Healthcare, LLP, \_\_\_\_ S.W.3d \_\_\_, 2019 WL 1873428 (Tex. Apr. 26, 2019). In *Rohrmoos*, this Court reiterated the evidence necessary to establish reasonableness and necessity in a fee-shifting claim:

Sufficient evidence includes, *at a minimum*, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.

*Id.* at \*20 (citation omitted and emphasis added).

The lawyers' affidavits fail to include all but one of these required items. They do not detail the particular services performed, who performed them, or when they were performed, and provide no information about the amount of time spent on any particular service. Under *Rohrmoos*, the affidavits are insufficient to support the award.<sup>35</sup>

Beasley challenged the trial court's award based on the lack of sufficient supporting evidence. And no one could reasonably dispute that the lawyers' affidavits are insufficient to support the award.

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<sup>&</sup>lt;sup>35</sup> This should have been clear even before *Rohrmoos*, from cases like *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013) (per curiam), and *Long v. Griffin*, 442 S.W.3d 253 (Tex. 2014).

# B. The court of appeals improperly applied the general presumption concerning unrequested transcripts despite Beasley's invocation of rule 34.6(c).

In rejecting Beasley's challenge, the court of appeals noted the unordered transcript and relied on the general rule that a missing transcript is presumed to support the trial court's judgment. *Beasley*, 2018 WL 5725245, at \*4 (citations omitted). But Beasley requested a partial reporter's record under rule 34.6(c). This request should have precluded application of the general presumption and mandated a contrary presumption that the record was complete.

# (i) This Court interprets rules like statutes, giving effect to their plain language.

In construing procedural rules, this Court's "primary objective is to give effect to the drafter's intent as expressed in the rule's language." *In re City of Dickinson*, 568 S.W.3d 642, 645-46 (Tex. 2019) (orig. proceeding) (citing *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009)).

This Court analyzes procedural rules "apply[ing] the same rules of construction that govern the interpretation of statutes." *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) (orig. proceeding) (citing *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex.

2012)). The Court "look[s] first to the rule's language and construe[s] it according to its plain meaning." *Id.* (citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007)). And—recognizing that procedural rules are part of a cohesive whole—the Court "consider[s] them in context rather than as isolated provisions." *Id.* at 646 (citation omitted).

Finally, the Court rejects form-over-substance requirements that favor procedural machinations over reaching the merits of a case:

Appellate procedure should not be tricky. It should be simple, it should be certain, it should make sense, and it should facilitate consideration of the parties' arguments on the merits.

Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 314 (Tex. 2000) (Hecht, J., concurring). Thus, the Court construes procedural rules "liberally so that the right to appeal is not lost unnecessarily." Burbage v. Burbage, 447 S.W.3d 249, 258 (Tex. 2014).

(ii) Rule 34.6(c) prevents application of the general presumption by imposing the opposite one—that the record is complete.

Rule 34.6 requires an appellant to "request in writing that the official reporter prepare the reporter's record." Tex. R. App. P. 34.6(b)(1). In doing so, an appellant must "designate the portions of the proceedings to be

included." *Id.* But Rule 34.6(c) permits an appellant to order a partial reporter's record:

If the appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points and issues.

TEX. R. APP. P. 34.6(c)(1). In that event, "[a]ny other party may designate additional exhibits and portions of the testimony to be included in the reporter's record." TEX. R. CIV. P. 34.6(c)(2).

Rule 34.6(c)(4) requires an appellate court to presume that the record is complete for purposes of appeal—meaning an unrequested portion of the record is *not* relevant to disposition of the appeal—even on a sufficiency challenge:

The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.

TEX. R. APP. P. 34.6(c)(4). A leading guide to appellate practice confirms the presumption concerning missing portions of the record does not apply to "limited records under TRAP 34.2 or 34.6(c)." ALESSANDRA ZIEK BEAVERS, O'CONNOR'S TEXAS CIVIL APPEALS 270 (2018) (citations omitted).

Rule 34.6(c), then, provides an orderly procedure for appeals based on a partial record. It permits an appellant to request a partial record and designate the issues on appeal. This puts the appellee on notice that the appellate court will presume the designated portions of the record constitute the entire record for reviewing those issues. To prevent this, the appellee can order any additional portion of the record it deems necessary. If the appellee does not designate any additional portion, rule 34.6(c) requires an appeals court to presume the record is complete as to the designated issues.

Rule 34.6(c) prevents parties from having to order unnecessary portions of the record, thereby alleviating the strain on court reporters and reducing both the time and cost of an appeal. At the same time, the rule protects an appellee from having to defend an appeal without parts of the record that support its defense.

Nothing in Rule 34.6(c) relieves an appellant of the ultimate burden to bring forth a record showing reversible error. *See generally Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). Proper invocation of the rule simply "prevents the application of the general presumption that any missing portions of the record support the trial court's judgment in favor of a presumption that the partial record submitted by the parties includes all

portions of the record relevant to the enumerated points or issues to be presented on appeal." *Garcia v. Sasson*, 516 S.W.3d 585, 590-91 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Except that here, it didn't.

Whether by oversight or intentionally, the court of appeals violated rule 34.6(c) and wrongfully deprived Beasley of a merits decision on his sufficiency challenge—a decision that almost inarguably would have resulted in reversal and remand for a trial on attorney's fees. This Court should grant review to clarify that once properly invoked, rule 34.6(c) precludes application of the presumption concerning an unrequested transcript.

2. This Court should grant review to clarify whether a defendant's fee-shifting claim must be filed before a nonsuit (and, if so, whether a boilerplate request in the prayer of a general-denial answer is sufficient).

Rule 162 of the Texas Rules of Civil Procedure permits a plaintiff to nonsuit its claims at any time before closing at trial. Tex. R. Civ. P. 162. Such a nonsuit does not "prejudice the right of an adverse party to be heard on a pending claim for affirmative relief" or have any effect on a "motion for sanctions, attorney's fees, or other costs, pending at the time of dismissal, as determined by the court." *Id.* "Parties have an absolute right to nonsuit *their own* claims, but not *someone else's* claims they are trying to avoid." *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 37 (Tex. 2008) (emphasis in original).

When Beasley nonsuited his declaratory-judgment claim, it should have extinguished all controversies relating to that claim other than any pending claim by the Society for affirmative relief. The court of appeals held that Beasley's nonsuit of his declaratory-judgment claims did not prevent the Society from recovering attorney's fees—on that claim—for two reasons.

First, the court held that the Society's fee-shifting claim did not have to be asserted before Beasley's nonsuit. Second, the court held that the Society's boilerplate reference to fees in its general-denial answer constituted a fee-shifting claim under the declaratory-judgments act. Both holdings are erroneous.

# A. A claim for fee-shifting must be filed before non-suit of the claim on which it is based.

As this Court held just four years ago, a party seeking fees under the declaratory-judgments act "must affirmatively plead for them to be eligible for a judgment containing a fee award." *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015) (citing Tex. R. Civ. P. 301). And, for a variety of reasons, such a pleading must be filed before the plaintiff nonsuits the declaratory-judgment claim.

A plaintiff's nonsuit of a claim for relief renders the merits of that claim moot and deprives the court of jurisdiction over it:

If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and jurisdiction as to the claim is lost.

City of Dallas v. Albert, 354 S.W.3d 368, 375 (Tex. 2011) (internal citations omitted). "But a nonsuit is not allowed to prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Id. Thus, a nonsuit does not deprive the trial court of its power to decide a sanctions motion or "any other motion" filed before the expiration of plenary power. Scott & White Mem. Hosp. v. Schexnider, 940 S.W.2d 594, 596 (Tex. 1996).

## (i) Epps does not support an award of fees absent a prenonsuit claim for them.

The trial court awarded fees based on its mistaken belief that *Epps* supported the award. In *Epps*, this Court held that a defendant may be a "prevailing party" entitled to contractual attorney's fees when the plaintiff nonsuits to avoid an unfavorable ruling on the merits. *Epps*, 351 S.W.3d at 862, 868–69. But in *Epps*, the defendant had asserted the right to recover fees under the parties' contract *before* the nonsuit—that claim was pending at the time of the nonsuit. *Id.* at 865. And that is the critical distinction.

Epps prevents a plaintiff from nonsuiting to avoid an unfavorable ruling that otherwise would entitle the defendant to recover attorney's fees. In other words, a nonsuit should not deprive the defendant of attorney's fees

it was on the cusp of obtaining via a ruling on the merits. But that isn't the situation where the defendant never pleads for fees before the nonsuit.

The Society never asked for attorney's fees under the declaratory-judgments act before Beasley's nonsuit. If Beasley had not nonsuited, and the Society had prevailed on its motion for summary judgment, it still would not have recovered attorney's fees. Thus, the Society was in no worse position as a result of the nonsuit. The trial court misread *Epps*.

# (ii) The court of appeals improperly analogized a claim for statutory attorney's fees to a motion for sanctions.

This Court has held that "the trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit" so long as the court retains plenary power. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) (citation omitted). The court of appeals improperly applied this principle to the Society's after-asserted claim for attorney's fees.

The Society sought an award of attorney's fees under the declaratory-judgments action. This was a statutory fee-shifting claim based on Beasley's claim for declaratory judgment—not a "collateral matter."

A claim for affirmative relief is one on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of action." *Ledbetter*, 251 S.W.3d at 38 (citations and internal quotation marks omitted). The Society could recover fees under the declaratory-judgments act even if Beasley abandoned his cause of action—so long as it asserted that entitlement before the nonsuit.

A claim for statutory attorney's fees differs fundamentally from a "collateral matter" like a motion for sanctions. Texas courts impose sanctions to deter misconduct and compensate parties for costs incurred in defending baseless pleadings. *Travelers Ins. Co.*, 315 S.W.3d at 864. Rule 162 should not be permitted to frustrate these purposes by allowing a party to evade sanctions simply by nonsuiting an aggrieved opponent. *Id.* at 864–65.

But this has nothing to do with a claim for attorney's fees founded in statutory entitlement. Awarding attorney's fees in fee-shifting situations is a matter of compensation to the prevailing party for reasonable losses in litigation, not punishment for misconduct. *See generally Rohrmoos*, 2019 WL 1873428, at \*11 (citation omitted).

# (iii) Permitting a post-nonsuit claim for attorney's fees will deter plaintiffs from nonsuiting claims.

Rule 162 serves an important systemic purpose by permitting plaintiffs to discontinue lawsuits where circumstances render further litigation inappropriate. Permitting a defendant to raise a post-nonsuit fee-shifting

claim "would have a chilling effect on appropriate nonsuits . . . ." See generally Klein v. Dooley, 949 S.W.2d 307, 308 (Tex. 1997) (citation omitted).

Where a defendant, like the Society, chooses not to assert any entitlement to attorney's fees under the plaintiff's claim, the plaintiff should be able to nonsuit that claim without risking a post-nonsuit assertion of the claim. Any other rule would mean that a plaintiff like Beasley, asserting a claim that permits fee-shifting, "would have no choice but to continue the litigation process, whether further litigation was appropriate or not." Felderhoff v. Knauf, 819 S.W.2d 110, 111 (Tex. 1991). Encouraging the pursuit of claims that should be abandoned would be undesirable both for the individual litigants and for the justice system.

# B. A boilerplate request for attorney's fees in the prayer of a general-denial answer isn't sufficient.

In *Wells Fargo*, this Court held that a party properly pleaded for attorney's fees where both parties sought declaratory relief and the prevailing party sought fees *both* by pleading its entitlement "pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code" *and* by a general request in its prayer for relief. *Wells Fargo*, 458 S.W.3d at 915–16. This case presents an important question left unresolved by *Wells Fargo*: What about a party who recovers fees defensively and includes *only* a general

request for fees in its prayer for relief?

The court of appeals held that the Society's boilerplate prayer for "attorney's fees . . . and general further relief" in its answer was sufficient to support the trial court's award. At least one other intermediate appellate court has reached the same result. *Nolte v. Flournoy*, 348 S.W.3d 262, 270 n.3 (Tex. App.—Texarkana 2011, pet. denied).

This Court should grant review to reject this reasoning and clarify that a boilerplate prayer for attorney's fees in an answer is not sufficient to assert an affirmative claim for fees. If a defendant wants to recover fees under a feeshifting provision, the defendant must assert a claim for those fees.

Texas follows the "fair notice" standard for pleadings. Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007). Rule 47 requires that "[a]n original pleading which sets forth a claim for relief . . . shall contain . . . a short statement of the cause of action sufficient to give fair notice of the claim involved . . . ." Tex. R. Civ. P. 47. "The key inquiry is whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." DeRoeck v. DHM Ventures, LLC, 556 S.W.3d 831, 835 (Tex. 2018) (citation and internal quotation marks omitted).

The notion that the Society's reference to fees in the prayer of its answer notified Beasley that it was asserting a statutory claim to fees under the declaratory-judgments act turns the fair-notice standard on its head. Beasley could not possibly have divined that intent from the Society's boilerplate language—which is included in the concluding prayer of almost every answer filed in a Texas civil lawsuit (even in cases where everyone knows the defendant cannot possibly recover attorney's fees).

Moreover, permitting this type of boilerplate reference to fees in a concluding prayer—without any preceding reference to facts or law relating to recovery of fees—would amount to ambush-by-pleading. A party like Beasley would have no inkling of the assertion of a statutory fee-shifting claim when deciding whether to nonsuit his claim. And then, upon entry of the nonsuit, whammo! This is the very type of situation the fair-notice pleading requirement is designed to prevent.

This Court considered a similar situation in *Kissman v. Bendix Home* Sys., Inc., 587 S.W.2d 675 (Tex. 1979). A DTPA plaintiff alleged in his petition that he sought to recover the difference in market value of a mobile home as warranted and as delivered; he did not assert any cause of action or otherwise seek damages for the cost of repairs. But after recovering those

damages, the plaintiff argued that his concluding prayer for general relief supported the award. This Court disagreed, holding that only "relief consistent with the theory of the claim reflected in the petition may be granted under a general prayer." *Id.* at 677 (citation omitted).

To be sure, a party need not always identify a claim by name to provide fair notice of its pendency. Sometimes, for example, factual allegations make clear the nature of the claim being asserted. See, e.g., Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 616–17 (Tex. 2004). Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473, 476 (Tex. 1988). But to constitute a claim for relief, a statement in the general prayer must relate back to something in the pleading—either supporting facts establishing assertion of the claim, or the enunciation of the claim itself.

The Society said nothing about attorney's fees other than a passing reference in the prayer. Similar to *Kissman*, this was insufficient to provide fair notice of a statutory fee-shifting claim. *See Kissman*, 587 S.W.2d at 677.

This Court should grant review to clarify that a statutory fee-shifting claim must be asserted before a plaintiff's nonsuit of the claim supporting recovery of fees—and that a passing reference in the prayer of a general-denial answer is not sufficient to do so.

# Conclusion

The decision by the court of appeals rests on two errors important to Texas jurisprudence. This Court should grant review, reverse the decision by the court of appeals, and—if the Court sustains Beasley's second issue on the lack of a pleading for fees—render judgment that the Society take nothing. Alternatively, if this Court sustains Beasley's first issue concerning the partial reporter's record, it should remand the case for further proceedings on the issue of fees.

Respectfully submitted,

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# **Certificate of Compliance**

This brief was prepared using Microsoft Word. Relying on the word count function in that software, I certify that this petition contains 4,924 words (excluding the cover, tables, signature block, and certificates).

/s/Charles "Chad" Baruch

# **Certificate of Service**

The undersigned certifies that a true and correct copy of this instrument was served this 5th day of August, 2019, by efiling and email, upon the following counsel of record:

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# App. 1 Court of Appeals Opinion and Judgment



# In The Court of Appeals Hifth District of Texas at Dallas

No. 05-17-01286-CV

PETER BEASLEY, Appellant

V.

# SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03141

# **MEMORANDUM OPINION**

Before Justices Myers, Evans, and Brown Opinion by Justice Evans

Appellant Peter Beasley appeals the award of attorney's fees in favor of appellee Society of Information Management, Dallas Area Chapter. Beasley also asserts that the trial court lacked jurisdiction to award attorney's fees to SIM-DFW. Finally, Beasley asserts that the trial court judge should be disqualified or recused based upon certain rulings. We affirm.

#### BACKGROUND

SIM-DFW is a national, professional society of information technology (IT) leaders which seeks to connect senior level IT leaders with peers, provide opportunities for collaboration, and provide professional development. Beasley was a member of SIM-DFW until April 19, 2016 when he was removed from the chapter during a board of directors' meeting.

<sup>&</sup>lt;sup>1</sup> Appellee notes in its brief that its correct name is the Society *for* Information Management, not the Society of Information Management and that it is locally known as SIM-DFW. Accordingly, we refer to appellee as SIM-DFW.

In March 2016, Beasley filed a petition against SIM-DFW alleging claims for injunctive relief, breach of fiduciary duty, and for whistleblower protection under the Sarbanes-Oxley Act of 2002. On July 5, 2016, Beasley filed a motion for partial summary judgment requesting that the court sustain two of his declaratory judgment causes of action. Following the hearing held on August 15, 2016, the trial court denied this motion by order dated August 18, 2016.

On June 30, 2017, Beasley filed a sixth amended petition which limited his claims to claims for declaratory relief. Three causes of action sought declarations that: (1) the April 19, 2016 expulsion meeting was void; (2) the actions taken by the board following his expulsion are also void until ratified by Beasley; and (3) SIM-DFW's bylaws and articles of incorporation prohibit charitable donations of SIM-DFW's assets to non-members.

It appears that Beasley later filed a motion for no-evidence summary judgment and another motion for partial summary judgment. SIM-DFW also appears to have filed a traditional and no-evidence motion for summary judgment. A hearing for all of these summary judgment motions was set for October 16, 2017.<sup>2</sup> On October 5, 2017, however, plaintiff filed a notice of nonsuit and motion to dismiss all claims against all parties without prejudice.<sup>3</sup> On October 18, 2017, SIM-DFW filed a motion for sanctions which stated that it had incurred attorney's fees in excess of \$193,000 in this lawsuit. During the hearing on this motion, the trial court requested that the parties provide briefing on whether there was a live request for attorney's fees. The trial court specifically requested briefing as to whether this situation merited an award of attorney's fees if Beasley nonsuited to avoid an unfavorable ruling. Both parties submitted additional briefing and

<sup>&</sup>lt;sup>2</sup> Neither Beasley's nor SIM-DFW's motions for summary judgment were included in the clerk's record but the record does contain hearing notices for these motions.

<sup>&</sup>lt;sup>3</sup> The record also contains references to the fact that Beasley's responses to SIM-DFW's motions for summary judgment were due on October 5, 2017—the same day that he filed his nonsuit and motion to dismiss all claims.

a hearing was held on November 3, 2017.<sup>4</sup> Following the November 3 hearing, SIM-DFW's counsel submitted a proposed order and the affidavits of Robert A. Bragalone and Peter S. Vogel supporting the request for attorney's fees in excess of the amount the trial court awarded. By order dated November 3, 2017, the trial court granted SIM-DFW's request for attorney's fees and awarded it \$211,032.02. In addition, the trial court's order granting attorney's fees recited the following:

- 1. Plaintiff filed certain declaratory judgment claims on April 15, 2016.
- 2. Defendant moved for summary judgment on those claims.
- 3. The hearing on the motion for summary judgment was scheduled for October 12, 2017, making Plaintiff's response due on October 5, 2017.
- 4. On October 5, 2017, in lieu of filing a response to the motion for summary judgment, Plaintiff nonsuited his entire case.
- 5. The following factors support a finding that the nonsuit was filed to avoid an unfavorable ruling on the merits:
  - (a) the timing of the nonsuit;
  - (b) the strength of the motion for summary judgment;
  - (c) the failure to respond to the motion;
  - (d) the Plaintiff's prior litigation history, including a dismissal of all claims after resting his case during trial, which dismissal he then appealed to the Dallas Court of Appeals;<sup>5</sup> and
  - (e) Plaintiff's conduct during this very contentious litigation, including his conduct as a *pro se* party and as a Plaintiff in conjunction with five different appearances by lawyers, including the resources of eight (8) different judges in six (6) different courts.

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. On December 18, 2017, Beasley filed a first and second notice of appeal in which Beasley appeals

<sup>&</sup>lt;sup>4</sup> According to the briefing, there is no transcript for the November 3, 2017 hearing.

<sup>&</sup>lt;sup>5</sup> The reference to the case involving a dismissal of all claims is to an unrelated case titled *Beasley v. Richardson*, No. 05-15-01156-CV, 2016 WL 5110506 (Tex. App.—Dallas 2016, pet. denied).

from "the Final Judgment order entitled 'Order Granting Attorney's fees [sic] as Prevailing Party on Declaratory Judgment Claims' for Defendant."

#### **ANALYSIS**

# A. Summary Judgment and Award of Attorney's Fees

In the first issue, Beasley presents an argument which seeks for this Court to "correct a denied motion for summary judgment when the court erred, as a matter of law, by declaring the wrong party as having prevailed in support of an unnecessary, unreasonable, unjust and inequitable judgment for attorney fees." In four sub-issues, Beasley argues as follows: (1) the award of attorney's fees is erroneous where there is no showing it was reasonable, necessary, just or equitable and when Beasley should have prevailed on the declaratory judgment claim; (2) the expulsion was void, as a matter of law for violating due process, as the Board refused to tell Beasley the reasons he faced expulsion and did not provide proper notice, and Beasley was entitled to relief by summary judgment; (3) the expulsion was void, as a matter of law, as the Board did not have a quorum and Beasley was entitled to summary judgment; and (4) the finding of "who prevailed" is an issue of fact to have been tried by a jury.

Beasley argues that the "trial court entered a final judgment declaring SIM Dallas the prevailing party on Beasley's denied motion for summary judgment." The trial court's order granting attorney's fees, however, is unrelated to Beasley's July 5th motion for partial summary judgment. As stated in the order, the trial court declared SIM-DFW the prevailing party on Beasley's declaratory judgment claims and granted SIM-DFW an award of attorney's fees

<sup>&</sup>lt;sup>6</sup> Although we construe pro se pleadings and briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with the applicable laws and rules of procedure. *In re* .E.B., 251 S.W.3d 211, 211–12 (Tex. App.—Dallas 2008, no pet.); *see also Gonzalez v.* ATR Const. LLC, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.) ("Appellate courts must construe briefing requirements reasonably and liberally, but a party asserting error on appeal still must put forth some specific argument and analysis showing that the record and the law support his contention."). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *In re* .E.B., 251 S.W.3d at 212.

pursuant to section 37.009 of the Texas Civil Practice and Remedies Code. Accordingly, to the extent that Beasley is arguing that an award of attorney's fees to SIM-DFW under section 37.009 was improper, we address such arguments below in sections A(1) and (2).<sup>7</sup> To the extent that Beasley is reasserting summary judgment arguments which were previously denied by the trial court, we will not address such arguments in this opinion because Texas law generally prohibits appellate review of a trial court's interlocutory order denying a party's motion for summary judgment.<sup>8</sup> *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007) (recognizing that the denial of summary judgment is normally not appealable); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996) ("The general rule is that a denial of a summary judgment is not reviewable on appeal."). Here, Beasley's motion was a motion for partial summary judgment and it is not properly before us. *See id.* 

# 1) Attorney Fees (Sub-issue One)

In sub-issue one of the first issue, Beasley argues that the award of attorney's fees is erroneous because the award was unnecessary, unreasonable, unjust and inequitable. Here, Beasley argues that the fees awarded were not just or equitable because SIM-DFW could have reduced its fees by taking certain actions such as pursuing dismissal of Beasley's lawsuit prior to engaging protracted and costly discovery. Beasley also argues that the amount of fees requested by SIM-DFW's attorneys could not be considered reasonable because such an amount was not "reasonable and necessary in defense of 'who is a member of a voluntary association."

<sup>&</sup>lt;sup>7</sup> We address sub-issue one of the first issue to the extent Beasley is arguing that the award of attorney fees is erroneous in section A(1). We also address sub-issue four of the first issue as to whether "who prevailed" is an issue of fact to have been tried by a jury in section A(2).

<sup>&</sup>lt;sup>8</sup> For the reasons stated in the text, we will not address sub-issue one of the first issue to the extent that Beasley is arguing that he should have prevailed on the declaratory judgment claim. We will also not address sub-issues two or three of the first issue which are summary judgment arguments previously made by Beasley which are not properly before us.

<sup>&</sup>lt;sup>9</sup> Section 37.009 of the Texas Civil Practice & Remedies Code provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are just and equitable."

In response, SIM-DFW notes that the trial court requested, and it provided, affidavits of defense counsel supporting the request for attorney's fees. SIM-DFW noted that the affidavits detailed "the amount of fees incurred in the defense of Appellant's claims, segregate the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and address the factors in *Arthur Andersen v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997)." In response to Beasley's arguments about what SIM-DFW could have done to reduce its fees, SIM-DFW notes that the trial court "relied on the procedural history of the case and Appellant's litigation history as an experienced *pro se* litigant who abuses the courts, wastes significant judicial resources, and uses lawsuits as a means to 'negotiate' private and non-justiciable matters to his satisfaction." SIM-DFW further asserts that because there is no reporter's record for the November 3, 2017 hearing, this Court must presume that the evidence supports the trial court's judgment.

An award of attorney's fees under the Declaratory Judgments Act is reviewed for abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The trial court does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision. *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2007, no pet.). It is an abuse of discretion for the trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet*, 972 S.W.2d at 21. In addition, we review the evidence in the light most favorable to the trial court's ruling, indulging every presumption in its favor. *Feldman v. PMG LLP*, 438 S.W.3d 678, 686 (Tex. App.—Houston [1st Dist.] 2014, no pet).

<sup>10</sup> As noted above, the trial court considered both Beasley's prior litigation history and his conduct during this litigation when awarding SIM-DFW its attorney's fees and costs in defense of the declaratory judgment claims.

The Declaratory Judgments Act imposes four limitations on the court's discretion to award attorney's fees. *Bocquet*, 972 S.W.2d at 21. The first two limitations are that the fees must be reasonable and necessary and these are fact questions for the trier of fact's determination. 

See id. The other two limitations on attorney's fees are that they must be equitable and just and these are questions of law. Feldman, 438 S.W.3d at 686.

In regard to the reasonableness and necessity of the fees, a factfinder should consider the following facts: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular appointment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainly of the collection before the legal services have been rendered. See Co., 945 S.W2d at 818. In this case, SIM-DFW submitted the affidavits Arthur Andersen following the hearing which addressed the amount of fees incurred in the defense of Beasley's claims, segregated the time spent defending the declaratory judgment claims as opposed to the other claims in the lawsuit, and addressed the Arthur Andersen factors. Further, we note that we do not have a reporter's record of the November 3, 2017 hearing to review. Without this record, we are unable to evaluate what evidence or testimony was relied on by the trial court during the hearing and we must presume that the evidence supports the trial court's judgment. See Favaloro v. Comm'n for Lawyer Discipline, 994 S.W.2d 815, 821 (Tex. App.—Dallas 1999, pet. stricken) ("If the appellant fails to bring forward a complete record, the court will conclude appellant has

<sup>&</sup>lt;sup>11</sup> We address the issue of why a jury did not determine the amount of fees in section A(2), *infra*.

waived the points of error dependent on the state of the evidence."); *Rush v. Barrios*, 56 S.W.3d 88, 96 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("No record was made of the hearing on the motion for fee forfeiture, and we must support the judgment of the trial court on any legal theory applicable to the case."). Finally, we note that the trial court did not award SIM-DFW the full amount of the fees it requested. Based on our review of the record, we cannot conclude that the trial court abused its discretion in determining that attorney's fees in the amount of \$211,032.02 were reasonable and necessary.

Under section 37.009, a trial court may exercise its discretion to award attorney's fees to the prevailing party, the nonprevailing party, or neither. Feldman, 438 S.W.3d at 685. Here, the trial court determined that SIM-DFW was the prevailing party on Beasley's declaratory judgment claims and was entitled to an award of attorney's because Beasley had filed a nonsuit to avoid an unfavorable ruling. Epps v. Fowler, 351 S.W.3d 862, 870(Tex. 2011). (holding that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits). In its order, the trial court stated that it considered the pleadings, evidence, and arguments of counsel and listed numerous factors in support of its decision to award fees, such as Beasley's prior litigation history, the timing of the nonsuit, and Beasley's conduct in this litigation. We note that the determination of whether an award of attorney's fees would be equitable or just is not susceptible to direct proof but instead is a matter of fairness in light of all the circumstances. See Anglo-Dutch Petroleum Int'l v. Greenberg Peden, P.C., 522 S.W.3d 471, 494 (Tex. App.— Houston [14th Dist.], pet. denied). Under the circumstances described above, we conclude that the trial court did not abuse its discretion in determining that an award of fees to SIM-DFW was equitable and just.

Accordingly, we overrule Beasley's sub-issue one of the first issue.

# 2. Waiver of Jury Trial (Sub-issue Four)

In sub-issue four of the first issue, Beasley argues that all questions of fact should be decided by a jury and that his declaratory judgment action "was entitled to trial by a jury." In regard to this argument, we note that there was no issue of fact for a jury to determine following Beasley's nonsuit of his declaratory judgment claims. Beasley then argues that the "determination of the amount of fees that are reasonable and necessary is a question of fact for the jury." We agree with Beasley's assertion that the reasonableness and necessity of fees is a fact issue. Bocquet, 972 S.W.2d at 21. Beasley, however, has not set forth any evidence that he raised an objection to the trial court, not a jury, making this determination. As an appellate court, we review a trial court's ruling or an objection to its refusal to rule. See Tex. R. App. P. 33.1(a)(2); Texas Dep't of Protective & Regulatory Servs. v. Sherry, 46 S.W.3d 857, 861 (Tex.2001) (constitutional claim on appeal in paternity suit waived by failure to raise complaint at trial) (citing *Dreyer v*. Greene, 871 S.W.2d 697, 698 (Tex.1993)); uintana v. CrossFit Dallas, L.L.C., 347 S.W.3d 445, 448–49 (Tex. App.—Dallas 2011, no pet.). "Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds." In re B.L.D., 113 S.W.3d 340, 350 (Tex. 2003). This is called preservation of error and requires that "a party's argument on appeal must comport with its argument in the trial court." napp v. Wilson . ones Mem'l Hosp., 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.); see TEX. R. APP. P. 33.1(a)(1). If an issue has not been preserved for appeal, we should not address it because nothing is presented for our review. See In re R.B., 200 S.W.3d 311, 317 (Tex. App.—Dallas 2006, pet. denied) (preservation of error requires a timely objection in the absence of which nothing is presented for appellate court review).

Here, Beasley's supplemental brief, as requested by the trial court, did not contain any objection to the trial court determining the reasonableness or necessity of attorney's fees. <sup>12</sup> Further, there is no reporter's record of the November 3, 2017 hearing so there is no record that any objection was made and ruled upon by the trial court. Accordingly, as Beasley cannot demonstrate that error was preserved, he has waived his right to complain on appeal that the trial court denied his right to a jury on the issue of reasonableness and necessity of fees. *See Sunwest Reliance Acquisitions Group v. Provident Nat'l Assurance Co.*, 875 S.W.2d 385, 387 (Tex. App.—Dallas 1993, no pet.) (holding that "when a party has perfected its right to a jury trial in accordance with rule 216 but the trial court instead proceeds to trial without a jury, the party must, in order to preserve any error by the trial court in doing so, either object on the record to the trial court's action or indicate affirmatively in the record it intends to stand on its perfected right to a jury trial."). Accordingly, in this instance, the trial court was the proper party to decide the issue of attorney fees because Beasley waived his right to have a jury decide this issue. For all the reasons described above, we overrule Beasley's sub-issue four of the first issue.

# B. Lack of Jurisdiction to Award Attorney's Fees

In Beasley's second issue, he argues that the trial court lacked jurisdiction to have a nonsuited defendant file a motion for attorney's fees and subsequently grant an award of fees which had not been requested before the nonsuit. Rule 162 provides that a dismissal "under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." Tex. R. Civ. P. 162.

<sup>&</sup>lt;sup>12</sup> In his objections to the Bragalone and Vogel (SIM-DFW's trial court attorneys) affidavits, Beasley did make the following objection: "Plaintiff further objects to the use of the evidence as a denial of due process and plaintiff's right to trial by jury." This objection, however, was filed after the hearing took place on November 3, 2017.

Both parties concede that SIM-DFW's answer contained a request for attorney's fees in its conclusion and prayer.<sup>13</sup> To the extent that Beasley is contesting the timeliness of SIM-DFW's request for attorney's fees, we find Beasley's argument unpersuasive. The Texas Supreme Court has decided that "the trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit" while the court retains its plenary power. See Travelers Ins. Co. v. oachim, 315 S.W.3d 860, 863 (Tex. 2010); see also Scott White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 (Tex. 1996) ("Rule 162 merely acknowledges that a nonsuit does not affect the trial court's authority to act on a pending sanctions motion; it does not purport to limit the trial court's power to act on motions filed after a nonsuit. In this case, the trial court imposed sanctions while it retained plenary jurisdiction. Nothing in Rule 162 or any previous decision of this Court deprives a trial court of this power."). Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by the costs it incurred in defending baseless pleadings. *Travelers* Ins. Co., 315 S.W.3d at 864. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting the aggrieved party. *Id.* at 864–65. The same analysis applies to a motion for attorney's fees filed after a nonsuit. See Proler v. City of Houston, 499 S.W.3d 12, 15 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("Rule 162 'permits the trial court to hold hearings and enter orders affecting ... attorney's fees ... even after notice of nonsuit is filed."").

Here, the trial court elected not to award sanctions but requested that the parties provide briefing on the issue of attorney's fees. The trial court's order concluded that Beasley nonsuited his case to avoid an unfavorable ruling on the merits and, following a hearing, the trial court elected to award attorney's fees pursuant to section 37.009 of the Texas Civil Practice and Remedies Code.

<sup>&</sup>lt;sup>13</sup> The clerk's record does not contain a copy of SIM-DFW's answer.

Further, all of these actions took place within the trial court's plenary jurisdiction.<sup>14</sup> Accordingly, we cannot conclude that the request for attorney's fees was untimely.

Beasley also argues that the attorney's fees should not be allowed because "a trial judge is prohibited from imposing sanctions, veiled as attorney's fees, against a nonsuiting party on the court's own motion." In support of this assertion, Beasley cites to *Dean v. Riser*, 240 F.3d 505, 508 (5th Cir. 2001). The *Dean* case, however, addresses the impact of a voluntary dismissal of a civil rights case on whether defendant was entitled to attorney's fees as a prevailing party under 42 U.S.C. § 1983. *Id.* at 507. That court ultimately remanded the case to the trial court for a determination of whether plaintiff withdrew to avoid an unfavorable judgment on the merits. *Id.* at 511. As the *Dean* case addresses attorney's fees under a federal statute, we do not find it relevant or persuasive. We note, however, that the trial court in this case did conclude that Beasley filed a nonsuit to avoid an unfavorable ruling on the merits and, as described above, awarded SIM-DFW its attorney's fees in accordance with section 37.009 of the Texas Civil Practice and Remedies Code.

For all the reasons described above, we overrule Beasley's second issue.

# C. Disqualification and Recusal

In his third issue, Beasley argues that the trial court judge should have been disqualified or have recused herself for advocating for one party over another. Beasley specifically argues that the trial judge should have been recused or disqualified because she was not impartial and acted as counsel for SIM-DFW.

<sup>&</sup>lt;sup>14</sup> The order of dismissal was signed on October 9, 2017. Therefore, the trial court's plenary jurisdiction expired thirty days after October 9, 2017. *See In re Bennett*, 960 S.W.35, 38 (Tex. 1997) ("However, the signing of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point for determining when a trial court's plenary power expires.").

# 1) Additional facts

On November 8, 2017, Beasley filed a verified motion to disqualify and recuse judge. Judge Moore declined to recuse herself and requested that another judge be assigned to hear the motion. On November 22, 2017, the presiding judge of the judicial region signed an order denying plaintiff's motion to disqualify and recuse judge which provided as follows:

After considering the evidence, the undersigned finds the motion should be denied. Without limitation, the motion is untimely because Plaintiff's complaints and evidence show that the rulings and actions of the judge for which he seeks recusal begin in January of 2017 and continue throughout 2017. Yet Plaintiff did not file a recusal motion until November 20, 2017. While one of Plaintiff's assertions is that the judge became an advocate for Defendant at a sanctions hearing, such complaint, again, is lodged after many months of rulings and actions Plaintiff contends support recusal; the judge's November 3 ruling on sanctions also is grounded in the history of the case.

\*\*\*

To the extent Plaintiff seeks disqualification of the judge, he has presented no valid legal or factual basis for disqualification.

# 2) Analysis

Beasley argues that the trial court judge should have been disqualified pursuant to the Texas Constitution and the Texas Rules of Civil Procedure because she acted as counsel in the case. Beasley specifically argues that the trial judge "conducted legal research" and "advocated" that SIM-DFW could pursue attorney's fees. Here, however, there was no assertion that the trial judge has served as a lawyer in the matter in controversy. Before a judge is disqualified on this ground, "it is necessary that the judge acted as counsel for some of the parties in [the] suit before him in some proceeding in which the issues were the same as in the case before him." *In re* 

<sup>&</sup>lt;sup>15</sup> See TEX. CONST. art. V, § 11 ("No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."); TEX. R. CIV. P. 18b(a)(1) ("A judge must disqualify in any proceeding in which: the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . ").

O'Connor, 92 S.W.3d 446, 448 (Tex. 2002). Beasley's argument that the trial judge acted "as

counsel" in this case because the trial judge conducted independent research and requested further

briefing or expressed her thoughts at hearings does not fall within the scope of the disqualification

grounds of either the Constitution or the Texas Rules of Civil Procedure and, accordingly, we

overrule this argument.

Beasley also argues that the trial court should have recused herself because of her bias and

prejudice against him. The Texas Rules of Civil Procedure provide that a judge must recuse in

any proceeding in which the judge's "impartiality might reasonably be questioned" or if the judge

has a "personal bias or prejudice concerning the subject matter of a party." See TEX. R. CIV. P.

18b(b)(1)-(2). We review an order denying a motion to recuse for abuse of discretion. *Drake v*.

Walker, 529 S.W.3d 516, 528 (Tex. App.—Dallas 2017, no pet.). The movant bears the burden

of proving recusal is warranted, and the burden is met only through a showing of bias or

impartiality to such an extent that the movant was deprived of a fair trial. Id. Further, bias by an

adjudicator is not lightly established and judicial rulings alone almost never constitute a valid basis

for a motion to recuse based on bias or partiality. *Id.* Here, Beasley argues that the trial judge was

biased because she raised the vexatious litigant statute during a hearing, requested additional

briefing on the issue of attorney's fees, and subsequently awarded a "large, flagrant attorney fees

award against Beasley." We conclude that Beasley did not meet his burden to establish bias and

overrule his third issue.

**CONCLUSION** 

On the record of this case, we affirm the trial court's judgment.

/David Evans/ DAVID EVANS JUSTICE

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# Court of Appeals Fifth District of Texas at Dallas

# **JUDGMENT**

PETER BEASLEY, Appellant

No. 05-17-01286-CV V.

SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, Appellee On Appeal from the 162nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-16-03141. Opinion delivered by Justice Evans. Justices Myers and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee SOCIETY OF INFORMATION MANAGEMENT, DALLAS AREA CHAPTER, recover its costs of this appeal from appellant PETER BEASLEY.

Judgment entered this 1st day of November, 2018.

# App. 2 Trial Court's Judgment

# CAUSE NO. DC-16-03141

PETER BEASLEY,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	Š	DALLAS COUNTY, TEXAS
SOCIETY OF INFORMATION	§	,
MANAGEMENT, DALLAS AREA	Š	
CHAPTER,	Š	
,	8	
Defendant	§	162 <sup>ND</sup> JUDICIAL DISTRICT

# ORDER GRANTING ATTORNEY'S FEES TO DEFENDANT AS PREVAILING PARTY ON DECLARATORY JUDGMENT CLAIMS

On November 3, 2017, Defendant's Supplemental Motion for Sanctions seeking to have Defendant declared a prevailing party and request for attorneys' fees came on for hearing. The Court, having considered the pleadings, evidence, and arguments of counsel, is of the opinion that the Defendant's Motion should be **GRANTED**.

Based on the evidence presented and the procedural history of this lawsuit, the Court makes the following findings and conclusions:

- 1. Plaintiff filed certain declaratory judgment claims on April 15, 2016.
- 2. Defendant moved for summary judgment on those claims.
- The hearing on the motion for summary judgment was scheduled for October 12,
   2017, making Plaintiff's response due on October 5, 2017.
- 4. On October 5, 2017, in lieu of filing a response to the motion for summary judgment, Plaintiff nonsuited his entire case.

- 5. The following factors support a finding that the nonsuit was filed to avoid an unfavorable ruling on the merits:
  - (a) the timing of the nonsuit;
  - (b) the strength of the motion for summary judgment;
  - (c) the failure to respond to the motion;
  - (d) the Plaintiff's prior litigation history, including a dismissal of all claims after resting his case during trial, which dismissal he then appealed to the Dallas Court of Appeals<sup>1</sup>; and
  - (e) Plaintiff's conduct during this very contentious litigation, including his conduct as a *pro se* party and as a Plaintiff in conjunction with five different appearances by lawyers, involving the resources of eight (8) different judges in six (6) different courts.
- 6. The reasonable and necessary attorney's fees and costs incurred by Defendant in defense of the declaratory judgment claims is 211,032.02

IT IS THEREFORE ORDERED that Defendant is declared the prevailing party on Plaintiff's declaratory judgment claims and that, pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 37.009, Plaintiff Peter Beasley is hereby ORDERED to pay Defendant's reasonable and necessary attorney's fees and costs in the amount of \$\frac{211}{211}, 032.02

<sup>&</sup>lt;sup>1</sup> Peter Beasley v. Seabrum Richardson and Lamont Aldridge, in the Court of Appeals for the Fifth District of Texas at Dallas, No. 05-15-00156-CV (September 20, 2016)

SIGNED this 3 day of October, 2017.

residing Judge

# App. 3 Request for Reporter's Record

# Cause No. DC-16-03141

PETER BEASLEY, IN THE DISTRICT COURT

PLAINTIFF.

v.

SOCIETY OF INFORMATION OF DALLAS COUNTY,

MANAGEMENT, DALLAS AREA **TEXAS** 

CHAPTER,

162nd JUDICIAL DISTRICT DEFENDANTS.

# PLAINTIFF'S REQUEST FOR REPORTER'S RECORD

Plaintiff Peter Beasley (õPlaintiffö or õBeasleyö), Pursuant to Rule 34.6 of the Texas Rules of Appellate Procedure, requests preparation of the Reporter & Record.

- 1. Plaintiff requests transcription of the following partial proceedings between the parties, which had no exhibits, except as listed in 1(e)(1):
  - a. August 15, 2016 (already transcribed)
  - b. February 13, 2017 (already transcribed)
  - c. October 4, 2017 (already transcribed)
  - d. October 31, 2017 (already transcribed)
  - e. November 22, 2017 (not yet transcribed)
    - i. With limited exhibits of:
      - 1. On-line biography of Peter Vogel,
      - 2. District and County Clerk record of Peter Vogeløs appearances before the court, and
      - 3. Texas Secretary of State listing of Judge Maricella Moore as a Director for CHRISTUS Healthcare.

- 2. Pursuant to Tex. R. App. P. 34.6 (c), plaintiff / appellant limits the appeal to the following points:
  - a. Issue #1. Appealing the November 3, 2017, award of attorney fees and finding of õprevailing partyö as the court lacked jurisdiction, the defendantøs lacked standing to make the late-filed request, plaintifføs due process rights were violated, and the evidence was legally and factually insufficient to support the award of fees and the finding that SIM Dallas was a prevailing party at anything.
  - b. Issue #2. Appealing the August 15, 2016, trial court defined of plaintiff motion for summary judgment to find the actions of the SIM Dallas Executive Committee on April 19, 2016, are void, as a matter of law, for not having a proper quorum and for not providing proper notice.
  - c. Issue #3. Appealing the August 15, 2016, trial court defined of plaintiff motion for summary judgment to find the actions of the SIM Dallas Executive Committee since April 19, 2016, as being void, as a matter of law, unless ratified by Beasley, for SIM Dallas excluding him from notice of, debate on, and voting on any and all such matters.
  - d. Issue #4. Appealing the February 22, 2017, trial courtøs abuse of discretion order, as expanded October 4, 2017, in ordering that plaintiff can only talk to members of SIM Dallas through a deposition.
  - e. Issue #5. Appealing the October 4, 2017, trial court abuse of discretion in holding that communications by SIM Dallas to its members about Peter Beasley and his company are attorney-client privileged communications.
  - f. Issue #6. Appealing the November 10, 2017, and November 22, 2017, denial of the trial judgeøs recusal and disqualification, as a matter of law and as an abuse of discretion.

Respectfully submitted,

/s/ Peter Beasley
Peter Beasley
P.O. Box 831359
Richardson, Texas 75083
972-365-1170

# **CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of January 2018, a true copy of the foregoing instrument was served on opposing counsel for the defendants by electronic means and the electronic transmissions were reported as complete.

<u>/s/Peter Beasley</u> Peter Beasley

App. 4
Tex. R. App. P. 34.6(c)

appeal under Rule 25.2; and

(13) subject to (b), any filing that a party designates to have included in the record.

# (b) Request for Additional Items.

- (1) Time for Request. At any time before the clerk's record is prepared, any party may file with the trial court clerk a written designation specifying items to be included in the record.
- (2) Request Must be Specific. A party requesting that an item be included in the clerk's record must specifically describe the item so that the clerk can readily identify it. The clerk will disregard a general designation, such as one for "all papers filed in the case."
- (3) Requesting Unnecessary Items. In a civil case, if a party requests that more items than necessary be included in the clerk's record or any supplement, the appellate court may regardless of the appeal's outcome require that party to pay the costs for the preparation of the unnecessary portion.
- (4) Failure to Timely Request. An appellate court must not refuse to file the clerk's record or a supplemental clerk's record because of a failure to timely request items to be included in the clerk's record.

### (c) Supplementation.

- If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item.
- (2) If the appellate court in a criminal case orders the trial court to prepare and file findings of fact and conclusions of law as required by law, or certification of the defendant's right of appeal as required by these rules, the trial court clerk must prepare, certify, and file in the appellate court a supplemental clerk's record containing those findings and

conclusions.

- (3) Any supplemental clerk's record will be part of the appellate record.
- (d) Defects or Inaccuracies. If the clerk's record is defective or inaccurate, the appellate clerk must inform the trial court clerk of the defect or inaccuracy and instruct the clerk to make the correction.
- (e) Clerk's Record Lost or Destroyed. If a filing designated for inclusion in the clerk's record has been lost or destroyed, the parties may, by written stipulation, deliver a copy of that item to the trial court clerk for inclusion in the clerk's record or a supplement. If the parties cannot agree, the trial court must on any party's motion or at the appellate court's request determine what constitutes an accurate copy of the missing item and order it to be included in the clerk's record or a supplement.
- (f) Original Documents. If the trial court determines that original documents filed with the trial court clerk should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the safekeeping, transportation, and return of those original documents. The order must list the original documents and briefly describe them. All the documents must be arranged in their listed sequence and bound firmly together. On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original document.
- (g) Additional Copies of Clerk's Record in Criminal Cases. In a criminal case, the clerk's record must be made in duplicate, and in a case in which the death penalty was assessed, in triplicate. The trial court clerk must retain the copy or copies for the parties to use with the court's permission.
- (h) Clerk May Consult With Parties. The clerk may consult with the parties concerning the contents of the clerk's record.

# 34.6. Reporter's Record

- (a) Contents.
  - (1) Stenographic Recording. If the

proceedings were stenographically recorded, the reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate.

(2) Electronic Recording. If the proceedings were electronically recorded, the reporter's record consists of certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any of the exhibits that the parties to the appeal designate, and certified copies of the logs prepared by the court recorder under Rule 13.2.

# (b) Request for preparation.

- (1) Request to Court Reporter. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record. The request must designate the exhibits to be included. A request to the court reporter but not the court recorder must also designate the portions of the proceedings to be included.
- (2) Filing. The appellant must file a copy of the request with the trial court clerk.
- (3) Failure to Timely Request. An appellate court must not refuse to file a reporter's record or a supplemental reporter's record because of a failure to timely request it.

#### (c) Partial Reporter's Record.

- (1) Effect on Appellate Points or Issues. If the appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues.
- (2) Other Parties May Designate Additions. Any other party may designate additional exhibits and portions of the testimony to be included in the reporter's record.
- (3) Costs; Requesting Unnecessary Matter. Additions requested by another

party must be included in the reporter's record at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the other party to pay the costs for the preparation of the unnecessary additions. This paragraph does not affect the appellate court's power to tax costs differently.

- (4) Presumptions. The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.
- (5) Criminal Cases. In a criminal case, if the statement contains a point complaining that the evidence is insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence and punishment.
- (d) Supplementation. If anything relevant is omitted from the reporter's record, the trial court, the appellate court, or any party may by letter direct the official court reporter to prepare, certify, and file in the appellate court a supplemental reporter's record containing the omitted items. Any supplemental reporter's record is part of the appellate record.
- (e) Inaccuracies in the Reporter's Record.
  - (1) Correction of Inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.
  - (2) Correction of Inaccuracies by Trial Court. If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must after notice and hearing –

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Nazari v. State, Tex.App.-Austin, June 17, 2016

354 S.W.3d 368

Supreme Court of Texas.

CITY OF DALLAS, Petitioner,

V.

Kenneth E. ALBERT, et al., Respondents.

No. 07–0284. | Argued Dec. 17, 2009. | Decided Aug. 26, 2011.

#### **Synopsis**

Background: Firefighters and police officers sued city for breach of contract and for declaratory relief, seeking enforcement of city ordinance governing wage increases for police officers, firefighters, and rescue officers. City counterclaimed for reimbursement of overpaid wages. The 199th Judicial District Court, Collin County, Robert T. Dry Jr., J., denied city's plea to jurisdiction. City filed interlocutory appeal, and then, while appeal was pending, nonsuited its counterclaim. On rehearing, the Dallas Court of Appeals, 214 S.W.3d 631,reversed in part based on determination that nonsuit reinstated city's immunity from suit, and remanded for determination whether city had waived immunity. Review was granted.

Holdings: The Supreme Court, Johnson, J., held that:

- [1] city's nonsuit of counterclaim for reimbursement of overpaid wages to police officers and firefighters did not automatically reinstate city's immunity from suit on plaintiffs claims that were germane to, connected with, and defensive to city's counterclaim;
- [2] city was immune from suit on claim for declaratory judgment to extent plaintiffs sought retrospective relief; and
- [3] fact that ordinance governing wage increases for police officers, firefighters and rescue officers was enacted pursuant to voter-approved referendum did not operate to abrogate city's immunity from suit.

Judgment of The Court of Appeals reversed; remanded to District Court.

Hecht, J., filed opinion concurring in part and dissenting in part, in which Jefferson, C.J., joined.

West Headnotes (14)

# [1] Municipal Corporations

Capacity to sue or be sued in general

#### States

← Liability and Consent of State to Be Sued in General

The State's immunity is referred to as sovereign immunity, while that of political subdivisions of the State is referred to as governmental immunity.

20 Cases that cite this headnote

# [2] Municipal Corporations

Capacity to sue or be sued in general

Governmental immunity is a common law doctrine, and while its boundaries are established by the judiciary, waivers of it are the prerogative of the Legislature.

2 Cases that cite this headnote

#### [3] Municipal Corporations

Capacity to sue or be sued in general

Governmental immunity is comprised of immunity from both suit and liability: "immunity from liability" protects entities from judgments while "immunity from suit" deprives courts of jurisdiction over suits against entities unless the Legislature has expressly consented.

44 Cases that cite this headnote

# [4] States

Necessity of Consent

Immunity from suit bars an action against the state unless the state expressly consents to the suit.

# 17 Cases that cite this headnote

# [5] Municipal Corporations

Pleading

The party suing a governmental entity must establish the state's consent to suit, which may be alleged either by reference to a statute or to express legislative permission.

5 Cases that cite this headnote

# [6] Municipal Corporations

Actions to recover compensation

# **Municipal Corporations**

Pay and other compensation

# **Public Employment**

- Recovery back of payments; overpayment

City's nonsuit of counterclaim for reimbursement of overpaid wages to police officers and firefighters did not automatically reinstate city's immunity from suit on plaintiffs' claim for declaratory relief with respect to interpretation of city ordinance governing wage increases and for breach of contract; once trial court acquired jurisdiction over city's claim, it also acquired jurisdiction to resolve plaintiffs' claims for amounts over and above amount that would offset city claims but were germane to, connected with, and defensive to city's counterclaim, and it retained that jurisdiction after city nonsuited its claim to extent trial court had acquired it, even though plaintiffs could not recover money damages against city because there were no claims to offset. V.T.C.A., Local Government Code § 271.152.

18 Cases that cite this headnote

# [7] Municipal Corporations

Actions

Once a governmental entity has asserted an affirmative claim for monetary relief, it must participate in the litigation process as an ordinary litigant as to that claim, and when a governmental entity asserts affirmative claims for monetary recovery, whether by filing suit or by counterclaim, the trial court acquires

jurisdiction over the entity's claims and certain offsetting, defensive claims asserted against the entity, not because the entity effected a change in its immunity by filing a claim, but because the judiciary has abrogated the entity's common law immunity from suit as to certain offsetting claims.

#### 25 Cases that cite this headnote

# [8] Pretrial Procedure



If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and jurisdiction as to the claim is lost. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

6 Cases that cite this headnote

# [9] Municipal Corporations

Capacity to sue or be sued in general

After governmental entities decide to litigate, they are bound to participate in the litigation process as an ordinary litigant.

2 Cases that cite this headnote

# [10] Municipal Corporations

Actions to recover compensation

# **Municipal Corporations**

Pay and other compensation

# **Public Employment**

Increase or Reduction

City was immune from suit on claim by police officers and firefighters for declaratory judgment in which they sought interpretation of city ordinance related to wage increases, in that plaintiffs alleged that they sustained damages equal to difference between amount of their salaries already paid by city and amount that city should have paid under ordinance, and they made no claim for injunctive relief, future payments, or any other future action from city, and therefore, only potential relief was award of money damages. V.T.C.A., Civil Practice & Remedies Code § 37.006(b).

#### 2 Cases that cite this headnote

# [11] Declaratory Judgment

Statutes as substantive or procedural

# **Declaratory Judgment**

Jurisdiction not enlarged

The Declaratory Judgment Act does not enlarge a court's jurisdiction; it is a procedural device for deciding cases already within a court's

jurisdiction. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

3 Cases that cite this headnote

# [12] Municipal Corporations

Capacity to sue or be sued in general

A party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. V.T.C.A., Civil Practice & Remedies Code § 37.006(b).

11 Cases that cite this headnote

# [13] Municipal Corporations

Actions to recover compensation

# **Municipal Corporations**

Pay and other compensation

# **Public Employment**

Increase or Reduction

Fact that ordinance governing wage increases for police officers, firefighters, and rescue officers was enacted pursuant to voter-approved referendum did not operate to abrogate city's immunity from suit for plaintiffs' claims of breach of contract arising out of city's application of ordinance.

3 Cases that cite this headnote

## [14] Municipal Corporations

Capacity to sue or be sued in general

Immunity protects a governmental entity from suits for money damages absent Legislative consent.

#### 10 Cases that cite this headnote

#### **Attorneys and Law Firms**

\*370 Barbara E. Rosenberg, Peter Brooke Haskel, James B. Pinson, Assistant City Attorney, E. Leon Carter, Munck Carter P.C., Richard A. Sayles, John Andrew Conway, Sayles Werbner, P.C., Madeleine B. Johnson, Southwest Airlines, Office of the Vice President, Thomas P. Perkins Jr., Dallas City Attorney, Deborah G. Hankinson, William Richard Thompson II, Hankinson Levinger LLP, Dallas, TX, for City of Dallas.

William M. Boyd, John R. Stooksberry, Boyd Veigel, P.C., McKinney, TX, E. Lee Parsley, Texas Civil Justice League, Jay B. Stewart, Terry L. Scarborough, V. Blayre Pena, Hance Scarborough, LLP, Austin, TX, for Kenneth E. Albert.

Eric G. Calhoun, Travis & Calhoun, P.C., Dallas, TX, for Dallas Police.

B. Craig Deats, Deats Durst Owen & Levy, P.L.L.C., Austin, TX, for Amicus Curiae Texas State Association of Fire Fighters.

Philip A. Lionberger, Office of the Attorney General, Austin, TX, for Amicus Curiae State of Texas.

Ophelia F. Camina, Susman Godfrey LLP, Dallas, TX, for Boyd Veigel, P.C.

# **Opinion**

Justice JOHNSON delivered the opinion of the Court, in which Justice WAINWRIGHT, Justice MEDINA, Justice GREEN, Justice GUZMAN, and Justice LEHRMANN joined, and in which Chief Justice JEFFERSON and Justice HECHT joined except to Part II–B.

This appeal involves a pay dispute between the City of Dallas and many of its police officers and firefighters. Pursuant to a referendum approved by the voters, the City adopted an ordinance addressing the pay of "each sworn police officer and fire fighter and rescue officer employed by the City of Dallas." Claiming the City did not properly pay them according to the ordinance, some firefighters and police officers (collectively, the Officers) sued the City. They sought both a declaratory judgment construing the ordinance and damages for breach of contract. The City counterclaimed,

alleging that if the Officers had not been paid correctly, they had \*371 been overpaid instead of underpaid and the City was entitled to reimbursement for the overpayments. The City eventually sought dismissal of the Officers' claims on the basis of governmental immunity, then later dismissed its counterclaim. The trial court denied the City's immunity claim and this interlocutory appeal followed. During the pendency of the appeal, the Legislature amended the Local Government Code to provide for a limited, retroactive waiver of certain local governmental entities' immunity from suit.

The main issues before us involve governmental immunity from suit. We will address the issues in the order that the court of appeals did: (1) what is the effect on the City's immunity of its filing, then non-suiting, the counterclaim; (2) what is the effect, if any, of the Legislature's retroactive waiver of immunity; (3) whether the City has immunity from the Officers' declaratory judgment action; and (4) whether the City lacks immunity from suit because the pay ordinance was adopted by referendum. We conclude that (1) by nonsuiting its counterclaim the City did not reinstate complete immunity from the Officers' pending claims; (2) the case must be remanded for the trial court to consider whether, by amending the Local Government Code, the Legislature waived the City's immunity; (3) the City has immunity from the declaratory judgment action; and (4) the ordinance having been adopted by referendum did not result in waiver or abrogation of the City's immunity.

# I. Background

Pursuant to a referendum that voters passed, the City of Dallas adopted an ordinance in 1979 addressing pay for police officers, firefighters, and rescue workers. *See* TEX. LOC. GOV'T CODE § 9.005(a), (b). The ordinance provided for a 15% pay raise and that "the current percentage pay differential between grades in the sworn ranks of [the Officers] shall be maintained." <sup>1</sup>

A dispute arose between the City and the Officers over whether the ordinance provided for a one-time pay raise or whether it provided for a one-time pay raise and also required the percentage pay differential to be maintained indefinitely so that if higher-ranking Officers received raises, lower-ranking Officers also received raises in order to maintain the differential. In 1994, the Officers sued the City.

The Officers sought both a declaratory judgment interpreting the ordinance and damages for breach of contract. Regarding their damages claim, the Officers argued that (1) the ordinance amended their employment contracts and the City was contractually bound to maintain the percentage pay differential after its adoption; and (2) the City breached the Officers' contracts by raising the pay of higher-ranking Officers without also raising the \*372 pay of lower-ranking Officers to maintain the percentage pay differential required by the ordinance. The Officers sought money damages for back pay and benefits as well as interest.

The City responded to the Officers' suit, then some time later filed a counterclaim to recover alleged overpayments to the Officers. The City asserted that if the pay raises were improper, then any raises given because the City misconstrued the ordinance were void and the Officers who received the raises must repay them. Later, the City filed a plea to the jurisdiction based on governmental immunity from suit. The Officers countered that the City's immunity had been expressly waived by Local Government Code Section 51.075 (stating a municipality "may plead and be impleaded in any court") and Chapter II of the Dallas City Charter (stating the City may "sue and be sued" and "implead and be impleaded in all courts"). See TEX. LOC. GOV'T CODE § 51.075; DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug.1999).

[1] The trial court denied the City's plea to the jurisdiction, and the City filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM.CODE § 51.014(8). While the City's appeal was pending, Texas sovereign immunity 2 law was both clarified and modified.

On the judicial front, we issued our first opinion in Reata Construction Corp. v. City of Dallas, 47 TEX.SUP.CT.J. 408 (Tex.2004) (Reata I). We held that the City waived immunity from suit by asserting claims for affirmative relief in a lawsuit. Id. at 410. After Reata I issued, the City nonsuited its counterclaim. Then, on rehearing, we withdrew the Reata I opinion and substituted a new opinion. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371 (Tex.2006). In the new opinion we held that a governmental entity does not have immunity from suit for monetary claims against it that are "germane to, connected with, and properly defensive to" affirmative claims made by the entity, to the extent the claims against the entity offset the

entity's claims. \*\*Id. at 378. The same day we decided \*\*Reata\*, we also decided \*\*Tooke v. City of Mexia\*, 197 S.W.3d 325 (Tex.2006). In \*Tooke\*, we held that the phrases "sue and be sued" and "plead and be impleaded" do not constitute clear and unambiguous waivers of governmental immunity. \*\*Id. at 342.

Further, while the case was pending at the court of appeals, the Legislature enacted Texas Local Government Code Sections 271.151–160. See Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548, 1548. Those provisions waive some local government entities' immunity from suit for certain contract claims. See TEX. LOC. GOV'T CODE § 271.152. The waiver of immunity is retroactive—it applies to claims based on contracts executed before the statute's effective date, so long as governmental immunity has not been previously waived with respect to the claims. Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549.

In light of the judicial and legislative proceedings that took place after the trial court made its rulings, the court of appeals affirmed in part, reversed in part, and remanded the case for reconsideration by the trial court. 214 S.W.3d 631, 638. Regarding immunity, the court of appeals held that under Reata the City did not \*373 have complete immunity once it filed a counterclaim for damages, but after it nonsuited the counterclaim it was immune from all the Officers' breach of contract claims. 

Id. at 635. The court reasoned that the City's nonsuit of its counterclaim reinstated the City's immunity from suit because the Officers' claims were no longer germane to, connected with, or properly defensive to anything the City was asserting, and the City was not making monetary claims against the Officers so the Officers' damages claims could not be offsets to claims of the City. Id. at 635-36. The court of appeals remanded the case for the trial court to consider whether the Legislature retroactively waived the City's immunity through Local Government Code Sections 271.151–.160. *Id.* at 636–37. Regarding the declaratory judgment action, the court of appeals determined that the Officers' action could proceed, but cautioned that money damages could not be recovered under the guise of declaratory relief. Id. at 637. Finally, the court of

appeals held that the adopting of the ordinance by means of

referendum did not preclude the City's having immunity from the Officers' claims. Id. at 637–38.

The parties filed cross-petitions for review, which we granted.  $^{3}$ 

#### **II. Discussion**

#### A. Governmental Immunity

[2] [3] [4] [5] Governmental immunity is a common law doctrine. City of Galveston v. State, 217 S.W.3d 466, 471 (Tex.2007). Its boundaries are established by the judiciary, but we have consistently held that waivers of it are the prerogative of the Legislature. Id. Governmental immunity is comprised of immunity from both suit and liability. See Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638 (Tex.1999). Immunity from liability protects entities from judgments while immunity from suit deprives courts of jurisdiction over suits against entities unless the Legislature has expressly consented:

[I]mmunity from suit bars an action against the state unless the state expressly consents to the suit. The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission. Since as early as 1847, the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.

Id. at 638 (citations omitted); see Hosner v. DeYoung, 1 Tex. 764, 769 (Tex.1847). In Reata, we concluded that immunity from suit as to a money damages claim does not completely deprive a trial court of jurisdiction over a governmental entity such as the City when the entity asserts an affirmative claim for monetary relief in a lawsuit:

where the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and \*374 properly defensive to those asserted by the governmental entity. And, our decisions that immunity from suit does not bar claims against the governmental entity if the claims are connected to, germane to, and defensive to the claims asserted by the entity, in effect, modified the common-law immunity doctrine and, to an extent, abrogated immunity of the entity that filed suit.

Id. at 376–77 (emphasis added). Referencing prior decisions dealing with the subject, including Catalina Dev., Inc. v. Cnty. of El Paso, 121 S.W.3d 704, 705–06 (Tex.2003), in which we discussed the possibility that a governmental entity might waive its immunity by conduct, we stated what may have been less than clearly articulated in those opinions: the common law doctrine of governmental immunity had been in a limited manner modified and abrogated for governmental entities that file

affirmative litigation claims. *Id.* at 375–77. Although litigation actions of governmental entities underlay our decisions in Reata and similar cases, we did not hold that those actions effected waivers of immunity; rather, they were factors we considered in defining the contours of immunity. In other words, we have not, in Reata or other decisions, altered the principles that (1) the boundaries of sovereign immunity are determined by the judiciary, City of Galveston, 217 S.W.3d at 471, and (2) waivers of sovereign immunity or consent to sue governmental entities must generally be found in actions of the Legislature. See Lid. at 468 ("We take as our starting point the premise that in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity.") (quoting Dallas Cnty. Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 341 (Tex.1998)); Harris Cnty. v. Dillard, 883 S.W.2d 166, 168 (Tex.1994) ("We have repeatedly held that the extent of waiver of governmental immunity is a matter for the Legislature to determine.") (citations omitted).

Turning to the issues before us, we first address the City's counterclaim and nonsuit. <sup>5</sup>

#### **B.** The Counterclaim and Nonsuit

#### 1. Effects

[6] The City urges, and the court of appeals held, that the City's nonsuit of its counterclaim reinstated the City's immunity from suit. The Officers disagree, and so do we.

Pursuant to our opinion in Reata, the City's filing of a counterclaim for affirmative relief resulted in each officer having two possible categories of damages claims pending. The first category consisted of claims that would offset, in whole or in part, any recovery by the City and that were germane to, connected with, and properly defensive to the City's claims. The second category consisted of (1) claims for amounts over and above the amount that would offset the City's claim but were nevertheless germane to, connected with, and properly defensive to the City's claims; and (2) claims that simply were not germane to, connected with, or properly defensive to the City's claim. The City had immunity from suit as to both types of claims in the second category, but it did not have immunity from suit as to claims in the first category. Because the City did not have immunity from suit as to claims \*375 in the first category once it filed its counterclaim, it could not either "reinstate" such immunity, or, put differently, in effect create it, by nonsuiting.

[7] Once a governmental entity has asserted an affirmative claim for monetary relief, it must participate in the litigation process as an ordinary litigant as to that claim. Reata, 197 S.W.3d at 377. And when a governmental entity asserts affirmative claims for monetary recovery, whether by filing suit or by counterclaim, the trial court acquires jurisdiction over the entity's claims and certain offsetting, defensive claims asserted against the entity. Id. That is not because the entity effected a change in its immunity by filing a claim, but because the judiciary has abrogated the entity's common law immunity from suit as to certain offsetting claims.

[8] Under litigation rules applicable to ordinary litigants, and thus to the City once it filed its counterclaim, the City was entitled to nonsuit its counterclaims. *See* TEX.R. CIV. P. 162 (providing that a party may nonsuit a claim at any time before all its evidence is introduced at trial except for rebuttal evidence). If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and

jurisdiction as to the claim is lost. See Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 862 (Tex.2010); Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz, 195 S.W.3d 98, 100 (Tex.2006) (per curiam). But a nonsuit is not allowed to prejudice the right of an adverse party to be heard on a pending claim for affirmative relief. TEX.R. CIV. P. 162; see Villafani v. Trejo, 251 S.W.3d 466, 469 (Tex.2008). Because the Officers had affirmative claims pending when the City nonsuited its counterclaim, the trial court retained jurisdiction over the Officers' claims to the extent it had acquired it. See Villafani, 251 S.W.3d at 469.

The money damage claim of each officer is based on allegations that under a proper interpretation of the pay ordinance the officer has been underpaid. The City's counterclaim alleged that under a proper interpretation of the ordinance if any officer had not been paid correctly then the officer had been overpaid and the City was entitled to recover the amount of overpayment. Both the City and the Officers cannot be correct, unless at some time an officer was underpaid and at another time the same officer was overpaid. And each of the officer's claims is independent. That is, if one officer was underpaid and another overpaid, the claims would not be combined so that the City would owe a net amount to the two officers together or so that the two officers together would owe the City a net amount.

The Officers' claims clearly were germane to—that is, relevant to 6—and connected with the City's counterclaim: they were both based on the question of pay for the Officers' employment. Also, the Officers' claims were properly defensive to the City's counterclaim because a finding that an officer had been underpaid would at least inferentially rebut the City's claim that the officer had been paid correctly or overpaid for the particular period for which the underpayment

was made. See Dillard v. Tex. Elec. Coop., 157 S.W.3d 429, 430 (Tex.2005) ("An inferential rebuttal defense operates to rebut an essential element of the plaintiff's case by proof of other facts."); Select Ins. Co. v. Boucher, 561 S.W.2d 474, 477 (Tex.1978) ("The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery." \*376 ). On the other hand, once the City nonsuited its counterclaim the Officers' claims could not offset any recovery by the City. So although the trial court had jurisdiction over the Officers' claims that would have been offsets to the City's counterclaim, after its nonsuit the City would not have a recovery for the Officers' claims

to offset. Nor could the Officers recover any judgment for damages against the City if the City was immune from suit as to the Officers' damages claims apart from the claims over which the trial court had jurisdiction because of their offsetting nature vis-a-vis the City's counterclaim. But even though the Officers could not recover judgment for damages against the City based on the trial court's limited jurisdiction resulting from the City's counterclaim, the City's nonsuit did not reinstate, or more aptly, create, immunity for the City. Rather, it put the Officers in the posture of other similarly situated claimants: they could not prevail on their breach of contract claims because they could not recover a judgment for damages and the City was not pursuing a claim for damages to which an offset would apply. See Intercontinental Grp. P'ship v. KB Home Lone Star LP, 295 S.W.3d 650, 655 (Tex.2009) (holding that a jury finding of "0" damages on a contract claim requires rendition of a take-nothing judgment when damages is the only relief sought).

#### 2. Response to the Dissent

The dissent says that the character of the Officers' claims was changed because "the assertion of the [City's] counterclaim gives the plaintiff's claim a different character; it becomes defensive and offsetting, when it was not before." 354 S.W.3d 368, 381 (Hecht, J., dissenting). We disagree. The nature of the Officers' claims did not change; the defensive, offsetting claims were the same as the claims that exceeded amounts that would offset the City's counterclaims. The dissent's approach would result in the City's action of nonsuiting its counterclaim effectively creating immunity for itself as to the Officers' claims that were defensive and offsetting, thus depriving the trial court of jurisdiction over those claims. For two primary reasons we decline to adopt that position.

First, to the extent the trial court had jurisdiction over the Officers' claims, the jurisdiction did not attach because the City's actions either changed the nature or character of the offsetting claims or somehow abrogated its immunity from suit. Jurisdiction attached because this Court has altered the boundaries of immunity from suit: governmental entities do not have immunity from offsetting claims germane to, connected to, and properly defensive to monetary claims by the entities. The City could not reinstate or create something it did not have. Allowing the City to create immunity for itself by saying that nonsuiting a counterclaim changes the character of the Officers' claims would substantively clothe the City with the power to deprive the trial court of

jurisdiction by its actions. Just as the City generally cannot waive immunity from suit by its actions, it cannot create immunity by its actions.

Second, there is no need to alter established principles in this area of the law when applying established principles addresses the issue. Under established principles and rules, the end result of the City's nonsuit is the same regardless of whether the nonsuit results in the Officers' claims being disposed of by a plea to the jurisdiction or another proceeding such as by motion for summary judgment. Summary judgment might take a little longer to obtain and result in more attorney's fees and effort by the City than would a plea to the jurisdiction, but the City made the choice to expend time and assets on litigation \*377 when it filed its counterclaim. And a governmental entity in the City's position will effectively continue to have the option of having its immunity from suit determined by interlocutory appeal. The entity still has immunity from suit as to claims in the second category outlined above. Once the entity asserts that it has such immunity, the trial court's ruling on the question will ordinarily remain subject to interlocutory appeal. The dissent's proposed course would create uncertainty and litigation over whether, and if so, when and how an entity's conduct in some manner resulted in a change in its immunity—regardless of whether the change is labeled as being the result of waiver or a change in the character of one of the claims against it.

[9] The dissent says that failing to afford a governmental entity full immunity from suit after nonsuiting claims for relief will cause much confusion. We disagree. There will be no more confusion than before such a nonsuit. Assuming the entity had full immunity before making its affirmative claims, if it decides to forego its claims it can dismiss them, make both a motion for summary judgment and a motion to dismiss based on immunity from suit, and it should prevail on all the claims against it regardless of whether the claims against it were defensive, offsetting claims, or otherwise. Such a process comports with our prior decisions to the effect that after governmental entities decide to litigate, they are bound to participate in the litigation process as an ordinary litigant.

E.g., Reata, 197 S.W.3d at 377. The process also precludes entities from having the power to, by their actions, deprive a trial court of jurisdiction by nonsuiting if matters do not go well for them as to their affirmative claims.

Accordingly, we disagree with the court of appeals to the extent it held that the City reinstated full immunity from suit by nonsuiting its counterclaim.

# C. Legislative Waiver of Immunity

Section 271.152 of the Local Government Code provides:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152. A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 212.151(2). The language is a clear and unambiguous waiver of governmental immunity for certain breach of contract suits. \*\*City of Houston v. Williams, 353 S.W.3d 128, 135 (Tex.2011).

The court of appeals remanded the issue of whether the Local Government Code amendments waive the City's immunity for the Officers' breach of contract claims. Neither party appealed that ruling.

We have remanded cases that were on appeal when the Legislature enacted the waiver of immunity in order that trial courts could first consider the waiver issue. See, e.g., City of Houston v. Clear Channel Outdoor, Inc., 197 S.W.3d 386, 386–87 (Tex.2006); McMahon Contracting, L.P. v. City of Carrollton, 197 S.W.3d 387, 387 (Tex.2006). Albert has, by post-submission motion, sought leave for the parties to submit briefing on and have us consider the issue. We recognize that this case has been pending for an extraordinarily long time because of various factors, many of which were out of the control of \*378 the parties. Nevertheless, we decline to address the merits of the issue in light of (1) the failure of the

parties to challenge the court of appeals' remanding of it, and (2) our having remanded similarly situated cases so the trial court could first consider the statutory waiver issue.

We next address whether immunity precludes the Officers' action under the Declaratory Judgment Act (DJA) for construction of the pay ordinance. The court of appeals held that it did not.

# D. The Declaratory Judgment Action

[11] [12] While the case was awaiting oral argument here, we decided City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex.2009). We affirmed the principle that the DJA does not enlarge a court's jurisdiction; it is a procedural device for deciding cases already within a court's jurisdiction. Id. at 370–71; Tex. Natural Res. Conservation Comm'n v. IT– Davy, 74 S.W.3d 849, 855 (Tex.2002). The DJA waives a municipality's immunity in a suit that involves the validity of a municipal ordinance, TEX. CIV. PRAC. & REM.CODE § 37.006(b), but a party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. City of Houston v. Williams, 216 S.W.3d 827, 828-29 (Tex.2007) (per curiam). For example, in Williams, we held that the City of Houston was immune from suit where a group of firefighters was seeking a declaratory judgment regarding statutory lump sum payments of accumulated vacation and sick leave. Id. at 828. We held that because the firefighters' only alleged injury had already occurred and their only plausible remedy was an award of money damages, they could not circumvent the City's governmental immunity by requesting declaratory relief. Id. at 829.

The Officers are not attempting to invalidate the pay ordinance. To the contrary, they are attempting to enforce the ordinance according to its terms as they read it. And like the firefighters in *Williams*, the Officers do not dispute that the City is immune from their declaratory judgment claims regarding past due payments. But they claim that the City's immunity is waived as to their declaratory judgment action seeking an interpretation of the ordinance and contract with regard to the salary to be paid in the future. Assuming without deciding that the City's immunity would be waived in such a situation, we disagree that the Officers sought a declaration governing their future relationship with the City. In their

trial court pleadings, the Officers alleged that they sustained damages equal to the difference between the amount of their salaries already paid by the City and the amount the City should have paid. They also asserted that they were seeking no damages for any back pay accrued following May 27, 1998, when the City adopted another pay resolution. The Officers made no claim for injunctive relief, future payments, or any other future action from the City. Because the Officers' only potential relief was an award of money damages, the City is immune from their declaratory judgment claims. See id.

The Officers assert that if we determine their declaratory judgment claims are actually ultra vires claims that they should have brought against city officials, then we should remand the case so they can amend their pleadings. See Heinrich, 284 S.W.3d at 371–72 (holding that a suit seeking a declaratory judgment that a governmental official acted without legal or statutory authority, such as where a statute or the constitution requires that a contract be performed in a certain way, is an ultra vires claim that must be brought against the official). But Heinrich clarified that \*379 only prospective, not retrospective, relief is available in an ultra vires claim. Id. at 376. Because the Officers sought only retrospective relief, their declaratory judgment claims must be dismissed. See id.

We turn next to the Officers' assertion that the City does not have immunity because the pay ordinance was adopted through the referendum process. The court of appeals disagreed with the Officers. So do we.

#### E. Effect of the Referendum

[13] The Officers assert that because this is a suit to enforce a voter-approved referendum, governmental immunity does not, or should not, apply. Addressing their arguments in logical order, we first consider their contention that on a policy basis the City's immunity in suits such as this should be abrogated. Referencing *Reata*, the Officers posit that because governmental immunity is a common-law doctrine, the Court should hold that it does not exist here because the purposes for immunity are inapplicable. The Officers claim that because the City's citizens made a policy decision requiring expenditure of city money, the rationale behind immunity—to protect the public treasury—is missing. *See* 

Heinrich, 284 S.W.3d at 375–76 (noting that the modern justification for immunity is protecting the public fisc).

The Officers' suit is for pay they assert is due and unpaid. The City asserts it does not owe the money. If the City is correct, the voters did not approve expenditure of the funds in the referendum. And suit to determine whether the Officers or the City is correct constitutes a suit for money damages. We have long recognized that immunity protects a governmental entity from suits for money damages absent Legislative consent. See Heinrich, 284 S.W.3d at 377; Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex.1997). In Reata, we concluded that immunity from suit was abrogated to a limited degree for two primary reasons: first, it would have been fundamentally unfair to allow the City to assert affirmative claims against another party while claiming immunity from the other party's claims connected to, germane to, and defensive to the City's claims; and second, the City had little room to complain about litigation costs because it had decided to expend resources on litigation when it filed its affirmative claim. Reata, 197 S.W.3d at 375– 76. But here we do not see any fundamental unfairness or inequity occurring just because the ordinance was adopted through the referendum process. Nor do we see how the fact that the ordinance was adopted by referendum should cause it to be treated any differently for immunity purposes from one adopted by the Dallas City Council. No one urges that it is any more or less effective as an ordinance than any other validly adopted ordinance. Accordingly, we decline to abrogate the City's immunity from suit based on the ordinance because it was adopted by referendum.

We next consider the Officers' arguments that consent to their suit against the City exists. First, they assert that the ordinance must be considered consent for suit because the referendum is only effective if its results are enforceable, and allowing immunity to trump an action to enforce the ordinance defeats the true purpose of the referendum. Again we disagree. The purpose of the referendum was to adopt the ordinance, just as that is the intent of any legislative body that adopts an ordinance or law. When the citizens approved the ordinance by referendum they were acting as the legislative body of the City. See Blum v. Lanier, 997 S.W.2d 259, 262 (Tex.1999) "Citizens who exercise their rights under initiative provisions \*380 act as and 'become in fact the legislative branch of the municipal government.' " (quoting Glass v. Smith, 150 Tex. 632, 244 S.W.2d 645, 649 (1951)). Their actions

in that capacity had the same effect insofar as adoption of the ordinance as legislative actions of the city council would have had if the council had adopted the ordinance absent the referendum. Moreover, the Officers do not argue that language in the ordinance purports to give consent for their damages suit against the City, even if a city ordinance could waive immunity. <sup>7</sup>

Next, the Officers argue that because the pay ordinance was adopted by referendum, that is, the citizens acting as a legislative body, immunity from suit must have been waived because the City would otherwise be asserting immunity against itself. The Officers reference City of Canyon v. Fehr, in which the court of appeals held that governmental immunity did not bar a suit by citizens to compel the City to order a referendum. 121 S.W.3d 899, 902–03 (Tex.App.-Amarillo 2003, no pet.). The argument misses the mark. In Fehr, citizens who opposed new zoning ordinance amendments sued the City, seeking to have the changes submitted as an issue in a referendum election. *Id.* at 901–02. The court of appeals reasoned that because the citizens were acting as the legislative branch of the city in the referendum process, allowing the city to invoke governmental immunity as to their suit would effectively result in the city using the immunity doctrine against itself. Id. at 902–03; see also Blum, 997 S.W.2d at 262. In Blum, the Court concluded that those who are qualified to vote and who sign a petition for initiative and referendum "have a justiciable interest in seeing that their legislation is submitted to the people for a vote." Blum, 997 S.W.2d at 262. The concepts underlying Fehr and Blum are not relevant here. The Officers are not acting as the legislative branch of the City. They are acting as private citizens seeking to recover money damages.

Based on the foregoing, we conclude that adoption of the ordinance by referendum did not result in loss, removal, or waiver of the City's governmental immunity as to the Officers' claims. We further conclude, as did the court of appeals, that the ordinance itself does not serve as consent to the Officers' suit just because it was adopted by referendum.

# III. Conclusion

The judgment of the court of appeals is reversed and the case is remanded to the trial court for further proceedings in accordance with this opinion.

Justice HECHT filed an opinion concurring in part and dissenting in part, in which Chief Justice JEFFERSON joined.

Justice HECHT, joined by Chief Justice JEFFERSON, concurring in part and dissenting in part.

I join in all but Part II–B of the Court's opinion.

In Reata Construction Corp. v. City of Dallas, we held that the government's immunity from suit on a claim for damages does not extend to a claim asserted as an offset to a claim on which the government itself has sued and that is "germane to, connected with and properly defensive to" \*381 the government's claim. <sup>1</sup> Thus, for example, when the government is sued for damages and asserts a counterclaim, it is not immune from the plaintiff's suit to the extent his claim is defensive and offsetting. The counterclaim does not waive immunity; that would contradict the rule that waiver of immunity is generally a legislative matter. <sup>2</sup> Rather, the assertion of the counterclaim gives the plaintiff's claim a different character; it becomes defensive and offsetting, when it was not before. In my view, when the counterclaim is nonsuited or lost, the plaintiff's claim is no longer defensive and offsetting and is therefore barred by immunity. Just as the assertion of the counterclaim gave the plaintiff's claim a different character, when the counterclaim is gone, the plaintiff's claim loses that character. Immunity is not "reinstated"—the word the Court uses. The government is simply not immune from suit on defensive, offsetting damage claims, but is immune from damage claims that are not defensive and offsetting.

The Court rejects this simple approach for two reasons. First, it argues, the government cannot create immunity by its own actions. <sup>3</sup> I agree. We have held, for example, that when the government is sued on a claim for which immunity is waived, it cannot gain immunity by settling and then refusing to perform its obligations under the settlement agreement. <sup>4</sup> But nonsuiting a counterclaim, thereby leaving the plaintiff with a claim that is non-defensive, does not create immunity. Suppose the plaintiff, too, nonsuits, then refiles the same claim. If his claim is not barred, then only the government's nonsuit has consequences. But if the plaintiff's claim is barred, as it surely is, it is not because he has re-created immunity by nonsuiting; it is because he does not have a defensive, offsetting claim.

The second reason the Court rejects my simple approach is that it offers "no benefit". 5 Even if the government is no longer immune from the plaintiff's suit after nonsuiting its counterclaim, the most the plaintiff can achieve is an offset against the government's recovery, and the government no longer has a claim. Of course, as the Court notes, the government can assert immunity by a plea to the jurisdiction and immediately appeal an adverse ruling, and to defeat the plaintiff's claim on the merits, it must move for summary judgment and wait to appeal an adverse ruling until the end of the case. This, the Court admits, "might take a little longer ... and result in more attorney's fees", but the government should lie in the bed it has made. Perhaps so, but that seems to me to be a policy choice the Legislature should make. There is, in fact, some benefit to the government in being relieved of the additional burden, as the Court itself admits.

The Court holds instead that the result of the government's nonsuiting a counterclaim is extremely convoluted. In this case, when the City filed a counterclaim to the officers' damage claims,

officer had two possible categories of money damages claims pending. The first category consisted of claims that would offset, in whole or in part, any recovery by the City and that were germane to, connected with, and properly defensive to the City's claims. The second category consisted of (1) claims for \*382 amounts over and above the amount that would offset the City's claim but were nevertheless germane to, connected with, and properly defensive to the City's claims; and (2) claims that were not germane to, connected with, or properly defensive to the City's claim. The City had immunity from suit as to both types of claims in the second category, but it did not have immunity from suit as to claims in the first category. Because the City did not have immunity from suit as to claims in the first category once it filed its

counterclaim, it could not "reinstate" such immunity by nonsuiting. <sup>6</sup>

Maybe a chart will help. This, I think, illustrates the passage just quoted:

	germane to, connected with, and properly defensive to counterclaim	
	YES	NO
Y E S	Category 1	Category 2(2) immunity
N	Category 2(1)	

In the Court's view, the City's dismissal of its counterclaim could not and did not alter these categories. So the City has lost its immunity from offsetting claims but retained it from non-offsetting claims. The problem is, with no counterclaim, there is no way to determine which of the plaintiffs' claims are offsetting and which are non-offsetting, because the counterclaim will never be adjudicated. The determination is important because the City can still assert immunity to non-offsetting claims by a plea to the jurisdiction and immediately appeal an adverse ruling. Since the determination is impossible to make, it is not clear whether the City can still assert immunity or is left to attack the officers' claims on the merits.

Immunity for Category 2(1) claims is critical to the Court's position. Its loss by nonsuiting the counterclaim would offend the rule that has driven the Court to this monstrosity in the first place: that the government cannot waive or create immunity by its litigation conduct. Yet the survival of such immunity makes the Court's position unworkable.

The Court seems intent on punishing the government for asserting and then nonsuiting a counterclaim, but this is a classic example of cutting off the nose to spite the face. There are now two different ways for the government to establish non-liability, one by assertion of immunity and the other by challenging the merits of \*383 the plaintiff's claim; two different vehicles for raising the issue; and two different kinds of appeals. Actually, there are probably now three different kinds of appellate review: immediate, interlocutory appeal,

appeal from a final judgment, and mandamus, to substitute for the interlocutory appeal the Court has denied the government after the counterclaim is nonsuited. Let the litigation and confusion begin. Appellate courts running out of something to do will regard today's ruling as good news.

I repeat: when the government abandons or loses its claim, an opposing claim is no longer defensive and offsetting and should therefore be held to be barred by immunity, employing the usual procedures, just as if the counterclaim had not been asserted. From the Court's contrary view, I respectfully dissent.

Justice WILLETT filed a dissenting opinion.

### Justice WILLETT, dissenting.

Does Local Government Code Section 271.152 apply to waive the City's immunity? The Court wisely concludes the trial court should first tackle this potentially dispositive issue. If Section 271.152 applies, then that's that—the City has no immunity—making the balance of today's decision purely advisory, something the Court readily admits: "some of our discussion may not be necessary." To clarify, the Court is unwilling to decide what is possibly controlling but willing to pre-decide what is purely contingent. If bad facts make bad law, then old cases make odd law. This litigation began in 1994, and I well understand the Court's desire to prod it along. But we should not leapfrog lower-court review by pre-answering a host of subsidiary questions that will never be asked if Section 271.152 indeed applies. Finding the Court's advisory opinion inadvisable, I respectfully dissent.

The myriad governmental-immunity issues in this case provoke varied views. In their competing opinions, JUSTICE JOHNSON and JUSTICE HECHT debate a particularly vexing point: the existence (or not) of the City's immunity once it nonsuited its counterclaims. I think it unnecessary and improper for the Court to reach this and other satellite issues unless and until it determines that Section 271.152 is inapplicable—if it is. That "if" is mighty consequential, and mighty worthy of lower-court examination.

As the Court recognized earlier this year and reaffirms today, Section 271.152 effects a "clear and unambiguous" (and retroactive) waiver of governmental immunity in certain breach-of-contract suits. <sup>2</sup> Is this such a suit? If so, then the City lacks immunity. <sup>3</sup> What weight is then due the Court's

lengthy discussion of various other issues, all interesting but all incidental (the effect of the counterclaim, the declaratory-judgment action, and the referendum)? <sup>4</sup> As my LSAT instructor used to (mis)state: "It's irrelevant."

\*384 Under article V, section 8 of the Texas Constitution, we decide concrete cases; we do not dispense contingent advice. The "judicial power does not embrace the giving of advisory opinions," <sup>5</sup> those that decide an academic <sup>6</sup> or "abstract question of law without binding the parties." <sup>7</sup> Prudent development of the State's jurisprudence requires that courts refrain from giving "advice ... upon speculative, hypothetical, or contingent situations." <sup>8</sup> To be sure, this longrunning case poses important issues of Texas immunity law, issues we may need to decide one day. But today is not that day.

As the Court notes, Section 271.152 was enacted while this case was already at the court of appeals, meaning

the trial court never had an opportunity to consider its applicability. Likewise, the court of appeals did not discuss it, and neither party challenged that court's decision not to discuss it. Today this Court wisely declines to short-circuit lower-court review of whether Section 271.152 waives the City's immunity, a path we have consistently followed in analogous Chapter 271 cases. 9 My quibble lies in the Court's eagerness to undertake a full-dress analysis of various subissues, all of which evaporate if Section 271.152 applies. The Court has enough to keep itself busy without premature predecisions and consultative guidance that presupposes—if not predestines—a certain lower-court path.

Again, because I find the Court's opinion advisory—and thus inadvisable—I respectfully dissent.

#### **All Citations**

354 S.W.3d 368, 54 Tex. Sup. Ct. J. 1609

#### Footnotes

1 The ordinance, in relevant part, states:

Be it ordained that: (1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police Officers and fire fighters and rescue Officers of the City of Dallas with three years service in effect in the fiscal year beginning October, 1977; (2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained; and (3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977.

Dallas, Tex., Ordinance 16084 (Jan. 22, 1979).

- The State's immunity is referred to as sovereign immunity, while that of political subdivisions of the State is referred to as governmental immunity. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex.2006). For ease of reference we will generally use the term "governmental immunity."
- We consolidated four petitions, *City of Dallas v. Albert* (No. 07–0284), *City of Dallas v. Barber* (No. 07–0285), *City of Dallas v. Arredondo* (No. 07–0286), and *City of Dallas v. Willis* (No. 07–0287). We separately consolidated two other petitions, *City of Dallas v. Martin* (No. 07–0288), and *City of Dallas v. Parker* (No. 07–0289). The Court heard oral argument on all six petitions at the same time. The State of Texas submitted an amicus curiae brief.
- 4 When we refer to immunity, we will be referring to immunity from suit unless otherwise stated.
- Without intending to indicate an opinion on the matter, we acknowledge that on remand the trial court may determine that amendments to the Local Government Code have waived the City's immunity from suit. If that occurs, some of our discussion may not be necessary to resolution of the issues. Nevertheless, because this case has been pending for so long we address the issues to give the courts below and the parties guidance.
- 6 See BLACK'S LAW DICTIONARY 756 (9th ed.2009).
- In *Tooke*, the argument was made that the city waived immunity by charter language providing the city "may sue and be sued, ... implead and be impleaded in all courts and places and in all matters whatsoever." 197 S.W.3d at 344. We did not address the question of whether the city could waive its own immunity from suit because even if it could, the language in question did not clearly and unambiguously do so. *Id.*

- 1 197 S.W.3d 371, 377 (Tex.2006).
- 2 Id. at 375.
- 3 Ante at 376.
- 4 Prex. A & M Univ.-Kingsville v. Lawson, 87 S.W.3d 518 (Tex.2002).
- 5 Ante at 376.
- 6 Ante at 374–75.
- 1 The Court acknowledges that if Section 271.152 applies, "some of our discussion may not be necessary to resolution of the issues." *Ante* at 374 n. 5.
- City of Houston v. Williams, 353 S.W.3d 128, 134 (Tex.2011); see also TEX. LOC. GOV'T CODE § 271.152.
   TEX. LOC. GOV'T CODE § 271.152
- 4 See ante § II A-B, D-E.
- Firemen's Ins. Co. of Newark, N.J. v. Burch, 442 S.W.2d 331, 333 (Tex.1968).
- 6 See City of West Univ. Place v. Martin, 132 Tex. 354, 123 S.W.2d 638, 639 (Tex.1939).
- Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex.1993).
- 8 Patterson v. Planned Parenthood of Houston & Se. Tex., Inc., 971 S.W.2d 439, 443 (Tex.1998) (citing Camarena v. Tex. Emp't Comm'n, 754 S.W.2d 149, 151 (Tex.1988)).
- 9 City of Houston v. Williams, 216 S.W.3d 827, 829 (Tex.2007); City of Houston v. Clear Channel Outdoor, Inc., 197 S.W.3d 386, 386–87 (Tex.2006); McMahon Contracting, L.P. v. City of Carrollton, 197 S.W.3d 387, 387 (Tex.2006).

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# 556 S.W.3d 831 Supreme Court of Texas.

Brian DEROECK, Melinda Young, and Kathryn Boykin, Co—Trustees of the Walter A. DeRoeck QTIP Trust, Assignee of Texas Capital Bank National Association, Petitioners,

v.

DHM VENTURES, LLC, James W. Moritz, and Nathan W. Halsey, Respondents

NO. 17–0033 | Opinion delivered: June 22, 2018 | Rehearing Denied October 19, 2018

# **Synopsis**

**Background:** Holder of note secured by deed of trust and guaranteed by borrower's principals filed amended complaint to recover on balance due on note and acknowledgment of debt. The 126th Judicial District Court, Travis County, granted defendants' motion for summary judgment and denied holder's motion for summary judgment. Holder appealed. The

Austin Court of Appeals, 2016 WL 4270000, Amy Clark—Meachum, J., affirmed. Petition for review was granted.

**Holdings:** The Supreme Court held that:

- [1] holder was not required under pleading rules to "specifically and clearly" plead cause of action for acknowledgment of debt "in plain and emphatic terms,"
- [2] holder adequately pleaded claim against borrower and guarantors for acknowledgment of debt.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Judgment; Motion for Summary Judgment.

West Headnotes (9)

# [1] Limitation of Actions

#### Nature in general

A suit on a debt is separate from a suit on a later written acknowledgment of the debt, and the latter is not barred by limitations merely because the former is. Tex. Civ. Prac. & Rem. Code Ann. § 16.065.

Cases that cite this headnote

#### [2] Limitation of Actions

# Construction and Operation

A claim of acknowledgment of a debt, as a cause of action separate from an action on the debt for statute of limitations purposes, does not always require an explicit promise to pay the debt; rather, if the writing acknowledges the justness of the claim, the acknowledgment imports (1) an admission that the claim is a subsisting debt and (2) a promise to pay it, if unaccompanied by any circumstances repelling the presumption of willingness or intention to pay.

Cases that cite this headnote

## [3] Limitation of Actions

# Fime of making

The acknowledgment of a debt, as a cause of action separate from an action on the debt for statute of limitations purposes, can come before or after suit on the debt is barred by limitations.

Cases that cite this headnote

#### [4] Limitation of Actions

Acknowledgment, new promise, and part payment

A pleading of acknowledgment of a debt, as a cause of action separate from an action on the debt for statute of limitations purposes, must be made upon the new promise and must declare upon it as the cause of action, in order to avoid a plea of limitation on the original debt.

Cases that cite this headnote

### [5] Limitation of Actions

# Acknowledgment, new promise, and part payment

In pleading acknowledgment of a debt, as a cause of action separate from an action on the debt for statute of limitations purposes, the correct practice is either (1) to quote the writing alleged to constitute the new promise, or (2) to attach it to the pleading as an exhibit.

Cases that cite this headnote

#### [6] Limitation of Actions

Acknowledgment, new promise, and part payment

In pleading acknowledgment of a debt, as a cause of action separate from an action on the debt for statute of limitations purposes, holder of note secured by deed of trust and guaranteed by borrower's principals needed only to set forth claim for relief containing short statement of cause of action sufficient to give fair notice of claim involved; holder was not required to "specifically and clearly" plead cause of action "in plain and emphatic terms." Tex. R. Civ. P. 47.

Cases that cite this headnote

#### [7] Pleading

Statement of cause of action in general

A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. Tex. R. Civ. P. 47.

Cases that cite this headnote

#### [8] Pleading

Sufficiency of allegations in general

#### **Pleading**

Statement of cause of action in general

In determining whether a pleading adequately states a cause of action, the key inquiry is whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. Tex. R. Civ. P. 47.

Cases that cite this headnote

#### [9] Limitation of Actions

Acknowledgment, new promise, and part payment

Holder of note secured by deed of trust and guaranteed by borrower's principals adequately pleaded claim against borrower and guarantors for acknowledgment of debt, independent of cause of action to recover balance due on note, which was barred by four-year limitations period, despite defendants' assertion that allegations in support of acknowledgment claim were contained in section captioned "avoidance of defendants' limitations defense"; holder alleged that borrower and guarantors acknowledged debt evidenced by note and loan documents and showed willingness to pay balance after loan matured, and that effect of acknowledgment was to create new promise to pay old debt, and avoidance merely characterized function of acknowledgment claim and did not suggest that no claim was being asserted.

Cases that cite this headnote

\*833 ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS. AMY CLARK-MEACHUM, JUDGE

#### **Attorneys and Law Firms**

J. Woodfin Jones, Alexandra W. Albright, Wallace B. Jefferson, Alexander Dubose, Jefferson & Townsend LLP, 515 Congress Avenue, Suite 2350, William R. Hemphill Jr., Kasling, Hemphill, Dolezal, & Atwell, L.L.P., 301 Congress Avenue, Suite 300, Austin, TX, for Petitioners.

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### **Opinion**

#### PER CURIAM

The court of appeals held that a cause of action for acknowledgment of a debt must be "specifically and clearly"

pleaded "in plain and emphatic terms." <sup>1</sup> Because this holding conflicts with Rule 47(a) of the Texas Rules of Civil Procedure, which provides that a pleading is "sufficient" if it "give[s] fair notice of the claim involved," <sup>2</sup> we reverse and remand the case to the court of appeals for further proceedings.

DHM Ventures, LLC borrowed \$8.5 million for a real estate investment as evidenced by a promissory note secured by a deed of trust and guaranteed by two of its principals, James Moritz and Nathan Halsey. After the note matured on its second anniversary, it was acquired by the Walter A. DeRoeck QTIP Trust (the "Trust"). DHM continued to make principal and interest payments for more than four years, then stopped in December 2013, still owing \$7 million in principal and more than \$58,000 in interest. The Trust's trustees <sup>3</sup> sued DHM, Moritz, and Halsey (collectively, the "defendants") seven months later.

Both sides moved for summary judgment. The defendants argued that the Trust's claims were barred by the fourvear statute of limitations. 4 In its response, the Trust stated that "to the extent necessary and to simply avoid any limitations defense asserted by Defendants, Plaintiffs' summary judgment evidence shows that \*834 DHM and Halsey and Moritz each acknowledged the original debt evidenced by the Note up until December 2013 on multiple occasions." The Trust made a similar statement in an amended petition filed contemporaneously with the response. In both the amended petition and the response, the statement was in a section captioned "Avoidance of Defendants' Limitations Defense" that also described in detail the attached evidence supporting the Trust's assertion of acknowledgment. That section of the amended petition concluded: "For purposes of this avoidance pleading, the effect of these numerous acknowledgments is to create a new promise to pay the old debt evidenced by the Note and the loan documents." The section in the response added: "Such an acknowledgment of the old debt gives rise to a new claim separate from the old debt, and the moral obligation to pay is sufficient consideration for the new promise." But the amended petition, like the original petition, contained a section captioned "Causes of Action" that stated claims on the note and guaranties but not on the asserted acknowledgment. And the prayer of the amended petition sought judgment for "[t]he unpaid principal balance and accrued interest and other sums due to [the Trust] under the

terms of the Note and [guaranties]" without mentioning the asserted acknowledgment.

In reply to the Trust's response to their motion for summary judgment, the defendants argued that the Trust had not properly pleaded acknowledgment and had not produced evidence to support such a claim or its claims on the note and guaranties. The trial court denied the Trust's motion and granted the defendants' motion without stating the grounds. The court of appeals affirmed the summary judgment, concluding that while the Trust had raised acknowledgment in response to defendants' motion for summary judgment, it had failed to plead acknowledgment as a cause of action because it had not done so "specifically and clearly" and in "plain and emphatic terms." <sup>5</sup>

[5] A suit on a debt is separate from a [4] [1] [2] [3] suit on a later written acknowledgment of the debt, and the latter is not barred by limitations merely because the former is. We have held that an acknowledgment must "1) be in writing and signed by the party to be charged; 2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and 3) refer to the obligation and express a willingness to honor that obligation." 6 claim of acknowledgment does not always require an explicit promise to pay. "[I]f the writing acknowledges the justness of the claim, the acknowledgment imports (1) an admission that the claim is a subsisting debt and (2) a promise to pay it, if unaccompanied by any circumstances repelling the presumption of willingness or intention to pay." <sup>7</sup> The acknowledgment can come before or after suit on the original debt is barred by limitations. 8 A pleading of acknowledgment must be made "upon the new promise" and "must declare upon it as [the] cause of action, in order to avoid respondents' plea of limitation." <sup>9</sup> "The correct \*835 practice is either (1) to quote the writing alleged to constitute the new promise, or (2) to attach it to the pleading as an exhibit." 10

[6] [7] [8] Rule 47 requires that "[a]n original pleading which sets forth a claim for relief ... shall contain ... a short statement of the cause of action sufficient to give fair notice of the claim involved ...." <sup>11</sup> There is no exception for a pleading of acknowledgment. "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." <sup>12</sup> The key inquiry is whether the opposing party

"can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." <sup>13</sup>

In Hanley v. Oil Capital Broadcasting Ass'n, Hanley claimed he had sufficiently pleaded an acknowledgment cause of action. <sup>14</sup> He alleged in his petition that he performed services for Oil Capital and that Oil Capital had agreed to pay the fees. <sup>15</sup> Oil Capital had never before complained of the fees and had acknowledged the validity of the debt in letters saying it would make payment soon. 16 Hanley argued he could base his theory of acknowledgment on the admission in this letter. <sup>17</sup> Hanley never used the word "acknowledgment" in his petition. <sup>18</sup> We held "this was a sufficient notice to the respondents that Hanley intended to rely on the letters as a new promise in order to avoid the operation of the statute and that no further allegation in that regard was necessary." <sup>19</sup> "Moreover," we said, "any other holding would be contrary to both the letter and the spirit of Rule No. 47, Texas Rules of Civil Procedure." 20

[9] In the present case, the Trust's amended petition used the word "acknowledgment[]," unlike the petition in Hanley. The amended petition also detailed the evidence on which the Trust relied for its contention that the defendants had acknowledged their debt within four years of the Trust's filing suit. That evidence, attached as exhibits as Hanley instructs (though that might not have been necessary), included emails, checks, bank statements, and tax returns. The petition summarized:

Defendants each specifically acknowledged the debt evidenced by the Note and related loan documents. Further, they show a willingness to pay the Note. Also, the exhibits make reference to and acknowledge the obligation evidenced by the Note and the amount owed is susceptible of ready ascertainment. For purposes of

this avoidance pleading, the effect of these numerous acknowledgments is to create a new promise to pay the old debt evidenced by the Note and the loan documents.

Defendants argue that the assertion of acknowledgment and detailing of supporting evidence did not properly plead a claim because they were in a section of the amended petition captioned "Avoidance of Defendants' Limitations Defense." But \*836 "avoidance" merely characterized the function of an acknowledgment claim and did not suggest that no claim was being asserted. The "avoidance" was not to defeat the limitations defense to the suit on the original debt. That suit was still barred. The "avoidance" was the statement of a separate claim not barred by limitations—the only point of asserting acknowledgment.

Defendants also argue that the Trust's failure to list acknowledgment in the "Causes of Action" section and in the prayer of its amended petition show that it did not intend to plead acknowledgment as a cause of action. But neither failure kept the amended petition from being "sufficient to give fair notice"—Rule 47's standard—that the Trust was asserting a claim on the defendants' acknowledgment. As we have held, pleading facts sufficient to put an opponent on notice of a claim is sufficient, even if the claim is never actually named. <sup>21</sup>

The Trust's amended petition was fair notice to the defendants of its claim on their acknowledgment and thus satisfied Rule 47. The court of appeals erred in requiring a higher standard. We therefore grant the Trust's petition for review, and without hearing oral argument, <sup>22</sup> reverse the court of appeals' judgment and remand the case to that court to consider the parties' other arguments on appeal.

#### **All Citations**

556 S.W.3d 831, 61 Tex. Sup. Ct. J. 1597

# Footnotes

No. 03-15-00713-CV, 2016 WL 4270000, at \*2 (Tex. App.—Austin Aug. 9, 2016) (mem. op.) (citing Siegel v. McGavock Drilling Co., 530 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) ("[T]o recover on the new promise to pay embraced in the acknowledgment of the previous debt, the new promise to pay must be specifically

pleaded as the cause of action in order to avoid the pleaded bar of limitation to the original debt."), and *Canon v. Stanley*, 100 S.W.2d 377, 378 (Tex. Civ. App.—El Paso 1936, no writ) ("While the original cause of action should be set out as constituting the consideration for the new promise, the suit being upon the subsequent promise it should be alleged in plain and emphatic terms.")).

- 2 TEX. R. CIV. P. 47(a).
- The co-trustees are Brian DeRoeck, Melinda Young, and Kathryn Boykin.
- 4 TEX. CIV. PRAC. & REM. CODE § 16.004(a) ("A person must bring suit on the following actions not later than four years after the day the cause of action accrues: ... (3) debt ....").
- 5 2016 WL 4270000, at \*2-3.
- Stine v. Stewart, 80 S.W.3d 586, 591 (Tex. 2002); see also TEX. CIV. PRAC. & REM. CODE § 16.065 ("An acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged.").
- Hanley v. Oil Capital Broad. Ass'n, 141 Tex. 243, 171 S.W.2d 864, 865 (1943).
- 8 Cain v. Bonner, 108 Tex. 399, 194 S.W. 1098, 1098 (1917).
- 9 Hanley, 171 S.W.2d at 866.
- 10 | Id.
- 11 TEX. R. CIV. P. 47.
- 12 Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000) (quoting Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)).
- 13 | Id. at 896.
- 14 171 S.W.2d at 865.
- 15
- 16
- 17 | <sub>Id</sub>
- 18 Id. at 866.
- 19 | Id.
- 20
- 21 Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 616–17 (Tex. 2004) (facts pleaded were enough to alert the opposing party that a discrimination claim was being brought despite the absence of the word "discrimination" in the pleading);
  - Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473, 476 (Tex. 1988) (the factual allegations in the pleading should have alerted the defendant of the plaintiff's claims regardless of the plaintiff's failure to specifically mention the cause of action).
- 22 See TEX. R. APP. P. 59.1.

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Declined to Extend by Collins v. Baylor University, W.D.Tex., December 21,
2016

351 S.W.3d 862 Supreme Court of Texas.

Christopher N. EPPS and Laura L. Epps, Petitioners,

v.

Bruce FOWLER, Jr. and Stephanie L. Fowler, Respondents.

No. 10–0283. | Argued Feb. 3, 2011. | Decided Aug. 26, 2011.

# **Synopsis**

**Background:** Purchaser brought suit against vendor regarding alleged defects in house vendor sold, and vendor sought attorney fees from purchaser. After purchaser nonsuited without prejudice, the Williamson County Court at Law No. 4, Williamson County, John McMaster, J., entered take-nothing judgment against purchaser and awarded vendor fees based on prevailing party provision of parties' earnest money contract. Purchaser appealed. The Austin Court of

Appeals, 352 S.W.3d 1,modified judgment to reflect dismissal without prejudice and reversed fee award to vendor. Vendor petitioned for review.

Holdings: The Supreme Court, Lehrmann, J., held that:

- [1] a defendant is a prevailing party with respect to contractual language entitling a prevailing party to attorney fees when a plaintiff nonsuits a case with prejudice, and
- [2] a defendant may be a prevailing party with respect to contractual language entitling a prevailing party to attorney fees when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

Vacated and remanded.

Hecht, J., filed dissenting opinion in which Medina, J., and Johnson, J., joined.

#### Procedural Posture(s): On Appeal.

West Headnotes (13)

#### [1] Costs

American rule; necessity of contractual or statutory authorization or grounds in equity

Litigants may recover attorney's fees only if specifically provided for by statute or contract.

33 Cases that cite this headnote

#### [2] Contracts



Court's primary concern when construing a written contract is to ascertain the parties' true intent as expressed in the contract.

10 Cases that cite this headnote

#### [3] Contracts

Construction as a whole

When construing a contract, court may look to the entire agreement in an effort to give each part meaning.

8 Cases that cite this headnote

## [4] Contracts

Language of Instrument

When a contract leaves a term undefined, court presumes that the parties intended the term's plain, generally accepted meaning.

18 Cases that cite this headnote

# [5] Pretrial Procedure

**Effect** 

A nonsuit terminates a case from the moment the motion is filed. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

19 Cases that cite this headnote

#### [6] Pretrial Procedure

#### **Effect**

A nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

25 Cases that cite this headnote

# [7] Judgment

Judgment without prejudice

When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

10 Cases that cite this headnote

### [8] Pretrial Procedure



When a claimant nonsuits after an unfavorable partial summary judgment, the nonsuit is with prejudice as to the claims disposed of by the judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

11 Cases that cite this headnote

# [9] Costs



A defendant is a "prevailing party" with respect to contractual language entitling a prevailing party to attorney fees when a plaintiff nonsuits a case with prejudice.

39 Cases that cite this headnote

### [10] Limitation of Actions

Necessity in general

#### **Limitation of Actions**

Issues, proof, and variance

Limitations is an affirmative defense that must be pleaded and proven.

3 Cases that cite this headnote

#### [11] Costs

On dismissal, nonsuit, default, or settlement

A defendant may be a "prevailing party" with respect to contractual language entitling a prevailing party to attorney fees when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

#### 45 Cases that cite this headnote

# [12] Costs

- On dismissal, nonsuit, default, or settlement

In determining whether a plaintiff's nonsuit without prejudice was taken to avoid an unfavorable ruling on the merits such that the defendant would be a prevailing party with respect to contractual language entitling a prevailing party to attorney fees, courts should rely as far as possible on the existing record and affidavits, and resort to live testimony only in rare instances.

27 Cases that cite this headnote

# [13] Appeal and Error

Necessity of appellate process or of notice

### **Appeal and Error**

Particular Rulings, Objections, and Contentions

Vendor was not required to appeal trial court's denial of vendor's request for attorney fees as sanction against purchaser based on claim that purchaser's suit against vendor regarding alleged defects in house vendor sold was legally and factually groundless in order to be entitled to remand of that issue after reversal of award of attorney fees to vendor on alternative ground; vendor made claim for fees prior to purchaser's nonsuit without prejudice, and rules of appellate procedure provided that only parties who sought to alter trial court's judgment were required to file notice of appeal. Rules App.Proc., Rule 25.1(c); Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

1 Cases that cite this headnote

# **Attorneys and Law Firms**

\*864 Noel West Short, Travis Dale Weitzel, West Short & Associates, P.C., Georgetown, TX, for Christopher N. Epps.

Frank B. Lyon, Attorney at Law, Austin, TX, for Bruce Fowler, Jr.

#### **Opinion**

Justice LEHRMANN delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice WAINWRIGHT, Justice GREEN, Justice WILLETT, and Justice GUZMAN joined.

Two years ago, we held that a plaintiff who obtained favorable jury findings but no damages was not entitled to attorney's fees under contractual language entitling a prevailing party to

such fees. Intercont'l Group P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 652 (Tex.2009). Today, we consider whether a defendant is a prevailing party entitled to attorney's fees when the plaintiff nonsuits a claim without prejudice. We hold that such a defendant is not a prevailing party unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable judgment. We also hold that, because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice. Because the trial court has not had the opportunity to determine whether the plaintiff nonsuited in order to avoid an unfavorable judgment, we reverse the court of appeals' judgment and remand the defendant's claim for attorney's fees under the contract to the trial court. Finally, we hold that the court of appeals erred by not remanding the case to allow the trial court to dispose of the Eppses' pending claim for sanctions under chapter 10 of the Civil Practice and Remedies Code, and accordingly remand for the trial court to dispose of that alternative claim if it determines that fees are not available under the contract.

# I. Background

In 2004, Bruce and Stephanie Fowler purchased a house in Georgetown, Texas, from Laura and Christopher Epps. Two years later, the Fowlers allegedly discovered cracks in the house's sheetrock and evidence of past repairs. They concluded that the foundation was failing, and sued the Eppses for violations of the Deceptive Trade Practices Act,

\*865 that the Eppses were aware of problems with the house's foundation and failed to disclose them at the time of the sale. The Eppses denied having knowledge of any defects in the foundation. They sought their attorney's fees as sanctions under Chapter 10 of the Civil Practice and Remedies Code on the ground that the Fowlers' claims were legally and factually groundless. Alternatively, they sought attorney's fees under section 17 of the earnest money contract signed by the parties, which provides that "[t]he prevailing party in any legal proceeding related to the contract is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party." The contract does not define the term "prevailing party."

According to the Eppses, the Fowlers failed to respond to discovery, including the Eppses' requests for admissions, and cancelled or postponed a number of depositions. The Eppses moved for partial summary judgment, and the Fowlers responded with an expert report attached. The same day they filed their summary judgment response, the Fowlers filed a motion to substitute counsel, which was granted. The next day, the Fowlers' newly retained counsel filed a notice of nonsuit without prejudice. The parties proceeded to trial on the Eppses' contractual attorney's fees issue. At the trial, the Eppses expressly reserved their claim for fees as sanctions under Chapter 10.

Rather than dismissing the Fowlers' claims, the trial court rendered judgment that they take nothing and ordered that the Fowlers pay the Eppses' attorney's fees of \$22,950. The judgment provided that "[a]ny relief not granted herein is expressly denied." The Fowlers appealed. The court of appeals modified the judgment to reflect that the Fowlers' claims were dismissed without prejudice. 352 S.W.3d 1, 6. It also reversed the portion of the judgment ordering that the Fowlers pay attorney's fees, reasoning that a favorable decision on the merits of a case is necessary to confer prevailing party status on a litigant. 352 S.W.3d at 6–7. We granted the Eppses' petition for review to decide whether a defendant is a prevailing party when the plaintiff voluntarily nonsuits without prejudice. 54 Tex.Sup.Ct.J. 428 (Jan. 11, 2011).

# **II. Prevailing Party**

[2]

[1] Texas adheres to the American Rule with respect to attorney's fees. \*\*KB Home, 295 S.W.3d at 653. Under that rule, litigants may recover attorney's fees only if specifically provided for by statute or contract. \*Id.\* (citing \*\*MBM Fin. Corp. v. Woodlands Operating Co., 292 S.W.3d 660, 669 (Tex.2009)). Thus, we must determine if the contract between the Fowlers and the Eppses authorized the trial court's award of fees in this case to the Eppses because they "prevailed."

a written contract is to ascertain the parties' true intent

Our primary concern when we construe Id

as expressed in the contract. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 662 (Tex.2005) (citing \$\bigset\$ J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex.2003); Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 423 (Tex.2000); Coker v. Coker. 650 S.W.2d 391, 393 (Tex.1983)). We may look to the entire agreement in an effort to give each \*866 part meaning. Coker, 650 S.W.2d at 393. In this instance, the agreement does not expressly define the term prevailing party, and no other portion of the agreement sheds light on the term's meaning. When a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning. Valence Operating Co., 164 S.W.3d at 662; KB Home, 295 S.W.3d at 653. Accordingly, we give the term its ordinary meaning. Often, we consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation. See Reyes v. City of Laredo, 335 S.W.3d 605, 607

In *KB Home*, we held that a plaintiff who obtained a jury finding that the defendant had breached its contract but was awarded no damages was not a prevailing party. 295 S.W.3d at 655. We reasoned

(Tex.2010); Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 960 (Tex.1999); Guardian Life Ins. Co. of Am. v. Scott, 405 S.W.2d

64, 65 (Tex.1966). But in this case, as in our controlling

KB Home decision, we are interpreting a legal-usage term within a form contract, a term that many courts (including us

less than two years ago) have explicated by examining how

prevailing party is used statutorily.<sup>3</sup>

[w]hether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB Home got nothing except a jury finding that Intercontinental violated the contract.... Nor do we perceive any manner in which the outcome materially altered the legal relationship between KB Home and Intercontinental.

#### A. Federal tests

As we did in KB Home 4 we find federal cases focusing on the meaning of prevailing party instructive. <sup>5</sup> In *Buckhannon* Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the Supreme Court considered whether a plaintiff who received neither a favorable judgment nor a consent degree, but whose lawsuit nevertheless caused the defendant to voluntarily \*867 change its conduct, was a prevailing party. The Court rejected the notion that a plaintiff whose lawsuit had served as the catalyst for a change in the defendant's conduct should be considered a prevailing party entitled to attorney's fees under the Fair Housing Act Amendments, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205, overruling several Circuit Court decisions. Id. at 601-02, 121 S.Ct. 1835 (citing Estanton v. S. Berkshire Reg'l Sch. Dist., 197 F.3d 574, 577, n. 2 (1st Cir.1999); Marbley v. Bane, 57 F.3d 224, 234 (2d Cir.1995); Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541, 546–50 (3d Cir.1994); Payne v. Bd. of Educ., 88 F.3d 392, 397 (6th Cir.1996); Zinn v. Shalala, 35 F.3d 273, 276 (7th Cir.1994); Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., # 1, 17 F.3d 260, 263 n. 2 (8th Cir.1994); Kilgour v. Pasadena, 53 F.3d 1007, 1010 (9th Cir.1995); Beard v. Teska, 31 F.3d 942, 951– 52 (10th Cir.1994); Morris v. West Palm Beach, 194 F.3d 1203, 1207 (11th Cir.1999)). In reaching that conclusion, the Court noted that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary" to confer prevailing party status on the plaintiff. Id. at 604, 121 S.Ct.

1835 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)). A voluntary change in the defendant's conduct, by contrast, lacked the requisite "judicial imprimatur" to confer prevailing party status on the plaintiff. Id. at 605, 121 S.Ct. 1835.

While Buckhannon involved a plaintiff who claimed to

have prevailed because of the defendant's voluntary action, at least two Circuit Courts have applied its reasoning to defendants seeking attorney's fees as a result of plaintiffs' voluntary actions. In Claiborne v. Wisdom, the Seventh Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily moved to dismiss her claim. 414 F.3d 715 (7th Cir.2005). Exercising the discretion afforded it by Rule 41(a)(2) of the Federal Rules of Civil Procedure, 6 the district court dismissed the claim with prejudice. Id. at 717. The Seventh Circuit affirmed. Id. at 719. The order "effect[ed] a material alteration of [the plaintiff's] legal relationship with the other parties, because it terminate[d] any claims [the plaintiff] may have had ... arising out of this set of operative facts"; because the claims were dismissed with prejudice, they would be barred by res judicata or claim preclusion. Id.

Similarly, the Federal Circuit has held that a defendant was a prevailing party after the plaintiff filed a "Declaration and Covenant Not to Sue" on the eve of trial. \*\*Highway Equip. Co. v. FECO, Ltd., 469 F.3d 1027, 1035–36 (Fed.Cir.2006). In response to the declaration, the district court dismissed the plaintiff's claims with prejudice. Id. The Federal Circuit concluded that the defendant could be considered a prevailing party. \*\*Id.\*\* The dismissal with prejudice, which extinguished the plaintiff's ability to sue again on its claims, had "the necessary judicial imprimatur to constitute a judicially sanctioned change in the legal relationship of the parties." \*\*Id.\*\* at 1035.

\*868 In a case predating *Buckhannon*, cited by both parties, the Fifth Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily nonsuited his case with prejudice. \*\*Dean v. Riser, 240 F.3d 505 (5th Cir.2001). The court held that a defendant is not a prevailing party under section 1988 of the Civil Rights Act unless the defendant can establish that the plaintiff dismissed in order

to escape an unfavorable judgment on the merits. Id. at 511. The Fifth Circuit rejected the idea that the mere fact of dismissal, even with prejudice, was sufficient to confer prevailing party status on a defendant. Id. at 512. The court observed that the decision to nonsuit may well reflect a legitimate litigation strategy that

reveals nothing about the merits of a plaintiff's case [and thus] does not warrant a conclusion that a defendant in such a case has prevailed....

... [A] plaintiff whose claim appeared meritorious at the onset may encounter various changes in his litigation posture during the unpredictable course of litigation. "Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation."

Id. at 510 (quoting Christiansburg, 434 U.S. at 423, 98 S.Ct. 694). Thus, the federal courts have recognized that a defendant may be a prevailing party when the plaintiff nonsuits in two situations: when a suit is dismissed with prejudice, and when the nonsuit is taken to avoid an unfavorable merits decision.

#### B. Texas nonsuit law

[5] [6] [7] [8] In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. TEX.R. CIV. P. 162. No court order is required. *Id.; Travelers Ins. Co. v. Joachim,* 315 S.W.3d 860, 862 (Tex.2010). A nonsuit terminates a case "from 'the moment the motion is filed.'" *Joachim,* 315 S.W.3d at 862 (quoting *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz,* 195 S.W.3d 98, 100 (Tex.2006) (per curiam)). At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.* at 863; TEX.R. CIV. P. 162. When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims. *Klein v. Dooley,* 949 S.W.2d 307, 307 (Tex.1997). <sup>7</sup>

# C. When does a nonsuit alter the parties' legal relationship?

[9] In *KB Home*, we held that a plaintiff who secured favorable jury findings but was awarded no damages was not a prevailing party because the plaintiff received no relief that

materially altered the parties' legal relationship; the plaintiff's victory was simply illusory. \*\*KB Home, 295 S.W.3d at 652. By comparison, we have no doubt that a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party. As the Fifth Circuit has observed, a dismissal or nonsuit with prejudice is "tantamount to a judgment on the merits."

Riser, 240 F.3d at 509. The res judicata effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal relationship \*869 to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter.

Joachim, 315 S.W.3d at 862 (citing Gracia v. RC Cola—7–Up Bottling Co., 667 S.W.2d 517, 519 (Tex.1984)). As such, we hold that a defendant is a prevailing party when a plaintiff nonsuits a case with prejudice.

[10] In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief. Klein, 949 S.W.2d at 307. 8 Like the plaintiff in KB Home, the Eppses did not prevail upon the court to award them anything, either monetary or equitable. Moreover, we doubt that the parties to this agreement intended that there could be more than one prevailing party. But construing the agreement to apply to a plaintiff who nonsuits without prejudice could potentially result in just that, as the Eppses' counsel acknowledged in oral argument: after the defendant is awarded attorney fees in an initial action, the plaintiff could simply re-file the exact same claims, litigate them to a favorable judgment, and thus also become a prevailing party. Further, for us to determine that a defendant prevails within the meaning of the parties' agreement any time a plaintiff nonsuits without prejudice would require us to conclude that they sought to discourage all nonsuits. <sup>9</sup> As the Fifth Circuit noted, imposing attorney's fees on plaintiffs who take nonsuits regardless of the reason for or effect of the nonsuit "would penalize the plaintiff for doing precisely what should be done" and actually encourage plaintiffs to pursue claims that should be abandoned. Riser. 240 F.3d at 510. In construing the parties' agreement, it is reasonable to presume that they did not intend to encourage continued litigation of weak claims. But if, as the dissent suggests, any nonsuit will result in an award of attorney fees to the defendant, then a plaintiff may have the incentive to roll the dice and hope for a favorable judgment rather than accept an inevitable judgment

for attorney's fees.

[11] At the same time, it is logical to conclude that the parties intended to award attorney's fees to compensate the defendant when the plaintiff knowingly pursues a baseless action. It makes sense to conclude that the parties would have sought to "discourage the litigation of frivolous, unreasonable, or groundless claims" when a "calculating plaintiff ... voluntarily withdraws his complaint 'to escape a disfavorable judicial determination on the merits.'" *Id.* 

(quoting \*870 Marquart v. Lodge 837, Int'l Ass'n of Machinists and Aerospace Workers, 26 F.3d 842, 852 (8th Cir.1994)). That construction is consistent with the disfavor our cases have displayed toward nonsuits that are filed to circumvent unfavorable legal restrictions or rulings. See, e.g.,

In re Team Rocket, L.P., 256 S.W.3d 257, 260 (Tex.2008);
In re Bennett, 960 S.W.2d 35, 36 (Tex.1997); Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 854 (Tex.1995). Accordingly, in accord with Riser, we hold that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

The definition the Eppses propose—that a defendant prevails any time the plaintiff nonsuits—at first blush appears to promise simplicity of application. But the mere availability of fees, in itself, will almost inevitably expand the issues that must be resolved in a lawsuit. The amount and reasonableness of the fees will likely be the subject of continuing litigation, no matter how prevailing party is defined. And, while a bright-line definition under which a defendant never prevails when a nonsuit is without prejudice would reduce the triable issues, it would enhance the possibility that plaintiffs who pursue frivolous claims suffer no consequences and fail to reward defendants whose efforts cause their opponents to yield the playing field. Our review of federal district court decisions within the Fifth Circuit suggests that Riser's prevailing party test has not spawned a large amount of satellite litigation. In the decade since Riser was decided, only a bare handful of cases have focused on whether a defendant is a prevailing party under that case. See, e.g., Barnes v. Sanchez, NO. 3:07-CV-01184-M, 2011 WL 1831602, at \*2 (N.D.Tex. May 10, 2011); Hilborn v. Klein Indep. Sch. Dist., NO. H-09-840, 2010 WL 1463472, at \*2 (S.D.Tex. Apr. 12, 2010); Fox v. Vice, NO. 2:06–CV–135, 2008 WL 4386880, at \*3 (W.D.La. Sept. 22, 2008), aff'd, 594 F.3d 423 (5th Cir.2010), vacated on other grounds. —— U.S.

—, 131 S.Ct. 2205, 180 L.Ed.2d 45 (2011); Butler v. MBNA Tech., Inc., NO. 3:02-CV-1715-H, 2004 WL 389101, at \*5 (N.D.Tex. Mar. 1, 2004). Moreover, the cases suggest that the determination has been made largely based upon inferences drawn from the course of events in the lawsuit; the federal courts have tended to place great weight upon the fact that a plaintiff's nonsuit has followed closely on the heels of a defendant's potentially dispositive motion. For example, in Fox, the court determined that the defendants were prevailing parties in light of the fact that the plaintiff nonsuited only after the defendants moved to dismiss after the plaintiff conceded that she had no federal claim. 2008 WL 4386880, at \*3. And in MBNA Technology, the court noted that the plaintiff nonsuited only after the defendants moved for summary judgment, and that the timing of the dismissal suggested that the plaintiff's dismissal was not motivated by her failure to uncover evidence supporting her claims in discovery, but instead, was attributable to her desire to avoid an unfavorable judgment. 2004 WL 389101, at \*5; see also Barnes, 2011 WL 1831602, at \*2 (finding that the defendant was a prevailing party when the plaintiff moved to dismiss only after trial had commenced and the defendant had moved for dismissal); Hilborn, 2010 WL 1463472, at \*3 (finding that defendants were prevailing parties when the plaintiff sought dismissal only after the defendants presented uncontested affidavits establishing that the plaintiff had no viable First Amendment claim).

In applying the test, courts should rely as far as possible on the existing record and affidavits, and resort to live testimony only in rare instances. See Riser, 240 F.3d at 511. A number of factors \*871 may support an inference that a plaintiff has nonsuited in order to avoid an unfavorable ruling. For example, as in MBNA Technology, if a plaintiff nonsuits only after a motion for summary judgment is filed, it may suggest that the plaintiff elected to do so in order to escape summary judgment. See MBNA Tech., Inc., 2004 WL 389101. Further, a plaintiff's unexcused failure to respond to requests for admissions or other discovery that could support entry of an adverse judgment may also indicate that a nonsuit was taken to foreclose that possibility. Similarly, a failure to timely identify experts or other critical witnesses could suggest that a nonsuit is neither tactical nor voluntary. And the existence of other procedural obstacles, such as the plaintiff's inability to join necessary parties, may also signal that the defendant has prevailed over the plaintiff. On the other hand, as we have noted, it is reasonable to presume that

the parties did not intend to encourage continued litigation when discovery reveals previously unknown flaws in the plaintiff's claims. Accordingly, evidence that the suit was not without merit when filed may indicate that the defendant has not prevailed and is therefore not entitled to attorney's fees.

In this case, the record reflects that the trial court based its decision solely on the fact that the plaintiff nonsuited without prejudice. While the court of appeals' judgment reversing the trial court's award of fees is consistent with our holding today, no determination has been made whether the Fowlers nonsuited in order to avoid an unfavorable ruling. <sup>10</sup> Accordingly, we remand the case to the trial court to apply the standard we announce.

#### III. Remand for Consideration of Chapter 10 Remedy

The Eppses argue that, even if the court of appeals was correct in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, its judgment was erroneous. They maintain that the court of appeals erred by rendering judgment dismissing the Fowlers' claims with prejudice rather than remanding to allow the trial court to consider the Eppses' reserved claim for attorney's fees under chapter 10 of the Civil Practice and Remedies Code. The Fowlers contend that the Eppses waived that issue by failing to appeal the portion of the trial court's judgment denying all relief not expressly granted. We agree with the Eppses. The trial court's judgment recited that "[a]ny relief not granted herein is expressly denied." The Fowlers argue that the Eppses were required to appeal that portion of the judgment in order to be entitled to a remand. That argument fails for two reasons.

First, Rule 25.1(c) of the Rules of Appellate Procedure only requires a party who seeks to alter the trial court's judgment to file a notice of appeal. In this case, the judgment that the Eppses sought under chapter 10—\$22,950 in attorney's fees—is the same as the judgment that was awarded under section 17 of the earnest money contract. Thus, the Eppses were not required to file a notice of appeal challenging the trials court's denial of fees under chapter 10. Understandably, the Eppses' focus in the brief they filed in the court of appeals was on the fees the trial court awarded under the contract. But they \*872 advised the court of their affirmative claim under chapter 10, and one of the issues the brief presented was whether "a trial court abuse[s] its discretion in awarding attorney fees after a plaintiff's nonsuit where [the]

defendant ... had an independent counterclaim for affirmative relief on file at the time of the nonsuit." The court of appeals was sufficiently apprised of the Eppses' contention that they would be entitled to a remand if the court reversed the contractual attorney's fees. *See generally Consol. Eng'g Co. v. S. Steel Co.*, 699 S.W.2d 188 (Tex.1985).

Moreover, the court of appeals' disposition is inconsistent with Rule 162 of the Rules of Civil Procedure. Under that rule, a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." The court of appeals' rendition of judgment dismissing the Fowlers' claims without prejudice without allowing the Eppses the opportunity for a hearing on their chapter 10 claims ran afoul of Rule 162.

#### IV. Conclusion

The court of appeals did not err in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, as the lower court awarded fees based solely on the Howards' nonsuit without prejudice. Because the trial court has had no opportunity to determine whether the Fowlers dismissed to avoid an unfavorable judgment, we vacate the court of appeals' judgment and remand the Eppses' contractual attorney's claim to the trial court. We also remand the Eppses' claim for fees under chapter 10 of the Civil Practice and Remedies Code.

Justice HECHT filed a dissenting opinion, in which Justice MEDINA, and Justice JOHNSON joined.

Justice HECHT, joined by Justice MEDINA and Justice JOHNSON, dissenting.

The Fowlers and the Eppses signed a contract agreeing that if either sued the other, the "prevailing party" would be entitled to recover reasonable attorney fees. The Fowlers sued the Eppses, but after the Eppses had incurred \$22,950 in attorney fees defending the suit, the Fowlers suddenly nonsuited. Did the Eppses prevail?

Because the parties were undisputedly free to agree on what would happen in this situation, the answer depends entirely on what they meant when they signed the contract. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the

instrument." <sup>1</sup> But the Court is not primarily concerned with, or even especially interested in, ascertaining the Fowlers' and the Eppses' intentions from the text of their contract. The Court's primary concern is whether recovery of attorney fees from a plaintiff who nonsuits is good policy, and it presumes the Fowlers and the Eppses must have shared its view of the subject.

The Court begins, as it should, with the presumption that the Fowlers and the Eppses intended to give the word "prevailing" its ordinary meaning but then turns to federal case law for that meaning. The Court finds one case: the Fifth Circuit's 2001 decision in *Dean v. Riser*. There, the issue was whether a defendant sued in a civil rights action was a prevailing party within the meaning of 42 U.S.C. § 1988(b) when the plaintiff's claim was nonsuited \*873 with prejudice. The determinative consideration was "the general policies and competing interests that prompted Congress to enact [Title VII of the Civil Rights Act of 1964] authorizing district courts to award attorney's fees to prevailing parties in civil rights litigation." The court finally concluded:

The policy considerations surrounding the law of attorney's fees for prevailing civil rights litigants demand a flexible rule. It should empower trial courts to balance the concerns for encouraging vigorous enforcement of civil rights against discouraging frivolous litigation within the specific and unique context of each individual case. Accordingly, we hold that a defendant is not a prevailing party within the meaning of \$ 1988 when a civil rights plaintiff voluntarily dismisses his claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits. <sup>5</sup>

For two reasons, the federal cases the Court cites do not give guidance. First, the cases cited all deal with legislative policy reflected in public statutes, not with private parties' intentions in ordering their personal affairs by contract. The Court notes this problem, observing that "it might be improper to look to cases" construing statutes based on legislative policy choices for guidance in determining what private parties intended in a contract, <sup>6</sup> but then does it anyway. *Riser* could not be clearer in explaining that the availability of attorney fees there depended on policy considerations in the Civil Rights Act. There are no legislative policy choices involved in deciding what "prevailing party" means in a private agreement, even a standard form agreement like the one in this case. Second,

nothing suggests that private parties like the Fowlers and the Eppses would have federal case law in mind in reaching an agreement that attorney fees should go to a prevailing party.

The place to look for the ordinary meaning of words is not federal case law but a dictionary. According to Webster's Third New International Dictionary, to prevail means "to gain victory by virtue of strength or superiority: win mastery: TRIUMPH". 8 Now surely it is beyond argument that, policy considerations aside, when a plaintiff decides to abandon his lawsuit, the defendant, thereby relieved of the further worry and expense of defending himself, thinks he won. Common experience teaches that the challenger who forfeits, loses, and his opponent wins. Imagine the conversation between the Eppses and their lawyer: "Good news! The Fowlers dropped their suit." "Wow! So we won!" "No, you didn't win. The Fowlers just gave up." "But we said all along the case had no merit, and now they've effectively conceded it. We didn't win?" "Well, you have to understand that a federal case construing the Civil Rights Act has held that...."

\*874 The Court's problem with the Eppses' common-sense, dictionary understanding of "prevailing" is that it "appears to promise simplicity of application." The Court's notion of what it means to prevail has the virtue of complexity. The defendant prevails if the plaintiff takes a nonsuit with prejudice (because further suit would be barred by res judicata, an affirmative defense 10), but not if the nonsuit is without prejudice, even if further action would be barred as if the nonsuit were with prejudice (by limitations, for example, another affirmative defense 11), except when the nonsuit is taken to avoid an unfavorable judgment. It is impossible to think that parties like the Fowlers and the Eppses would ever have all this in mind when agreeing that a prevailing party should recover attorney fees.

The internal inconsistencies in this new test cannot be reconciled. One is between nonsuits of weak claims that should not be discouraged and nonsuits of claims to avoid unfavorable judgments that should be discouraged. The Court reasons that awarding attorney fees against a plaintiff who nonsuits a "weak claim[]" that "should be abandoned" would " 'penalize the plaintiff for doing precisely what should be done' ". 12 "At the same time," the Court concludes that attorney fees should be awarded against a plaintiff who "nonsuit[s] in order to avoid an unfavorable judgment." 13 What is the difference between a weak claim that should be abandoned, which can be nonsuited with impunity, and

a claim that is likely to result in an unfavorable judgment, which cannot? Says the Court: "the determination has been made largely based upon inferences drawn from the course of events in the lawsuit." <sup>14</sup> In other words: there is none. Then why differentiate between them? The pieces of this puzzled ruling have no unifying principle but are supported instead by a somewhat cynical pragmatism: the defendant who is nonsuited without prejudice cannot recover attorney fees unless he is willing to continue litigating to prove that the plaintiff would have lost anyway. And so a contractual provision unquestionably intended to discourage unnecessary litigation is construed either to foment it or do nothing at all.

Another inconsistency is in the Court's differentiation between post-nonsuit litigation that is barred by res judicata and post-nonsuit litigation that is barred by limitations. The Court concludes that attorney fees may be awarded against the nonsuiting plaintiff in the former instance but not the latter. Why? Because, the Court explains, "the mere possibility that limitations would bar future suits does not effect a change in the parties' relationship that confers prevailing party status on a defendant." 15 But the bar of res judicata is also a "mere possibility" in the sense that both it and limitations are affirmative defenses that are waived if not raised. If either is successfully raised, the effect is the same: suit is barred. Yet the Court goes out of its way to treat them differently. As hard as it is to understand why the Court would differentiate between the two defenses, it is impossible to think the Fowlers and the Eppses did.

\*875 The Court doubts that the Fowlers and the Eppses intended for a defendant to be awarded attorney fees after a nonsuit without prejudice because the result could be two different prevailing parties if the plaintiff refiles the same suit and wins. But the difficulty the Court sees in this example is not avoided by sparing the nonsuiting plaintiff from an attorney fee award. In the Court's view, if the plaintiff nonsuits without prejudice a claim that is then barred by limitations, the defendant has not prevailed. But if the plaintiff refiles the same action, the defense is raised, and the defendant wins, has he prevailed? Of course. The Court does not avoid the difficulty it raises.

In reality, the difficulty the Court sees should not have been any problem at all for the Fowlers and the Eppses, had they thought about it before signing their contract. It is neither illogical nor unreasonable for parties to agree that a plaintiff who abandons litigation should make everyone whole, even if he tries again and wins. The law may afford a mulligan, but

the parties can decide it should not be free. And if a prevailing attorney is to recover attorney fees, it makes perfect sense to award them to a defendant both when he is nonsuited, and again later when a second suit is dismissed based on res judicata or limitations.

Finally, the Court worries that to enforce a fee-shifting provision like the one in this case will result in satellite litigation over attorney fees. Usually, determining the amount of a party's reasonable attorney fees does not require much litigation. But the important point, here and throughout, is that any cause for concern belongs to the parties in reaching agreement, not to the Court in setting policy.

In the end, the Court forces parties who desire a broader fee-shifting agreement than it thinks is good policy to use clearer words than "prevailing party". "Just party" would only encourage more judicial subjectivism. I don't think "escaping party" would do it, because the nonsuiting plaintiff

may be escaping the defendant's becoming a prevailing party. "Fortunate party" might work, though it's very general. Viewed from another angle, the provision might award fees to the "oppressed party", though it, too, is very general and also injects a moral tone. But if "prevailing" is not clear enough, probably no one word is. To be safe, parties will have to spell out their intentions in more detail. An agreement to shift attorney fees will require more attorney fees to draft. But it will be worth it.

"A court must be careful not to substitute its own view of what should have been intended for what was intended." <sup>16</sup> In accordance with the parties' agreement, I would award the Eppses reasonable attorney fees. Accordingly, I respectfully dissent.

#### **All Citations**

351 S.W.3d 862, 54 Tex. Sup. Ct. J. 1759

#### Footnotes

- 1 The contract is a widely used standard Texas Real Estate Commission form contract.
- 2 There is evidence that several depositions of Bruce Fowler had to be rescheduled because he was working outside of the country. The requests for admission are not in the record before us.
- In fact, the petitioner in *KB Home* argued that the case presented an issue that was likely to recur and thus be important to the state's jurisprudence because of the term's use in numerous contracts, including a differently numbered version of the Standard One To Four Family Residential Contract (Resale) Texas Real Estate Commission form that the parties
  - entered into in this case. *See* Petitioner's Brief on the Merits at 5 n. 12, Intercont'l Group P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650 (Tex.2009).
- The dissent faults us for looking to federal cases to determine the parties' intent, but we applied a nearly identical analytical framework in *KB Home*, an opinion the dissent's author joined. And the dissent in *KB Home* raised almost the same
  - objections as the dissent in this case. In following *KB Home*'s analysis, we simply treat all parties to a lawsuit the same, whether they are plaintiffs or defendants, as we are obligated to do.
- The Eppses take issue with the court of appeals' reliance on cases interpreting the term prevailing party as used in statutes. We agree that it might be improper to look to cases focusing on whether courts should exercise their discretion
  - to award fees to a prevailing party, because those cases turn on legislative policy choices. *See, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412, 420–21, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (holding that defendant may be entitled to recover attorney's fees as prevailing party when a plaintiff voluntarily withdraws complaint if it establishes that the suit was groundless, because Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis"). We see no error, however, in looking to cases considering the plain meaning of the term prevailing party. We note that the Eppses themselves rely on statutory cases.
- Rule 41 permits plaintiffs to dismiss their claims without a court order before the opposing party serves either an answer or a motion for summary judgment, or with the stipulation of all parties. FED.R.CIV.P. 41(a)(1)(A)(i), (ii). A dismissal under Rule 41(a)(1) is generally without prejudice. *Id.* 41(a)(1)(B). If it is too late to dismiss under Rule 41(a)(1), a plaintiff may still elect to move to dismiss, but may do so only by court order "on terms that the court considers proper." FED.R.CIV.P. 41(a)(2).
- A plaintiff may not, however, take a nonsuit to avoid an unfavorable venue ruling. In re Team Rocket, L.P., 256 S.W.3d 257, 258 (Tex.2008). Further, when a claimant nonsuits after an unfavorable partial summary judgment, the nonsuit is

with prejudice as to the claims disposed of by the judgment. Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 854 (Tex.1995).

In this case, the Eppses contend that limitations would have barred any claims the Fowlers may have filed in a new lawsuit. Without considering the merits of that contention, we agree with the court of appeals that the mere possibility that limitations would bar future suits does not effect a change in the parties' relationship that confers prevailing party

status on a defendant. Limitations is an affirmative defense that must be pleaded and proven. See KPMG Peat

Marwick v. Harrison Cnty. Housing Fin. Corp., 988 S.W.2d 746, 748 (Tex.1999) (citing Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex.1997)). Further, limitations may, in some circumstances, be subject to exceptions

like fraudulent concealment and the discovery rule. BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 65–67 (Tex.2011). Until a defendant has secured a favorable ruling on a res judicata defense, there has been no material change in the parties' legal relationship

- 9 The Eppses maintain that section 17's purpose was to discourage the filing of frivolous claims. The agreement's language is not so narrow, however. If that were the provision's sole purpose, then it would award fees to a "prevailing defendant."
- 10 Of course, parties may elect to define prevailing party any way they choose, see Healthcare Cable Sys., Inc. v. Good Shepherd Hosp., Inc., 180 S.W.3d 787, 791 (Tex.App.-Tyler 2005, no pet.); Alexander v. Cooper, 843 S.W.2d 644, 647 (Tex.App.-Corpus Christi 1992, no writ), and could conceivably say that a defendant prevails any time a plaintiff nonsuits, with or without prejudice.
- 1 J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex.2003).
- 2 240 F.3d 505 (5th Cir.2001).
- 3 Id. at 506.
- 4 Id. at 507.
- 5 Id. at 511.
- 6 Ante at n. 3.
  - The Court accuses me of hypocrisy, or at least a faulty memory, pointing out that I joined the majority in Intercont'l Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650 (Tex.2009), which considered case law in determining when a plaintiff is a prevailing party. But we held in KB Home that a plaintiff who sues for damages and recovers nothing does not prevail. The case law the Court cited only supported the dictionary meaning of "prevailing".
- 8 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).
- 9 Ante at 870.
- 10 Fony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 314 (Tex.2006).
- 11 *Id.*

7

- 12 Ante at 869.
- 13 Ante at 864.
- 14 Ante at 870.
- 15 Ante at n. 8.
- Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 321 (Tex.2000) (Hecht, J., concurring) (emphasis in original).

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# 587 S.W.2d 675 Supreme Court of Texas.

Martin W. KISSMAN et al., Petitioners,

BENDIX HOME SYSTEMS, INC., Respondent.

No. B-8229. Oct. 3, 1979.

# **Synopsis**

Action was brought by mobile home purchaser against seller and manufacturer for alleged breach of express and implied warranties. The District Court, Lee County, John L. Placke, J., entered judgment for purchaser and manufacturer appealed. The Beaumont Court of Civil Appeals, 582 S.W.2d 471, reversed and purchaser appealed. The Supreme Court, Campbell, J., held that: (1) purchaser was not entitled to damages arising from cost of repairs resulting from defective condition of mobile home where there was a lack of evidence of any damages arising from manufacturer's breach of warranty and purchaser did not assert a cause of action nor seek damages for reasonable cost of repairs arising from any defective condition, and (2) the Court of Civil Appeals was not required to remand the cause for a new trial even though defendant had not made a prejudgment motion or motion for new trial on the no evidence point relied upon by the Court of Civil Appeals, neither was remand required in the interest of justice.

Affirmed.

**Procedural Posture(s):** On Appeal.

West Headnotes (7)

#### [1] **Damages**



Evidence as to reasonable cost of repairs was inadmissible for purposes of proving cost of repairs where purchaser sought to recover on a revocation of acceptance theory of recovery and did not assert a cause of action nor seek damages from manufacturer of mobile home for reasonable cost of repairs arising from any defective condition of mobile home.

#### Cases that cite this headnote

#### [2] **Pleading**

Sufficiency of allegations in general

Pleadings are sufficient under rules of civil procedure if they give fair and adequate notice to adversary. Rules of Civil Procedure, rule 45.

5 Cases that cite this headnote

#### [3] **Sales**

Rescission

Where mobile home purchaser's pleadings set out cause of action against manufacturer based on revocation of acceptance theory and did not assert cause of action nor seek damages for reasonable cost of repairs arising from any defective condition of mobile home, pleadings were not sufficient to give fair and adequate notice to manufacturer and evidence on cost of repairs was not admissible. Rules of Civil Procedure, rule 45.

10 Cases that cite this headnote

#### [4] **Pleading**



Prayer for relief

A prayer for relief must be consistent with facts stated as basis for relief; accordingly, only relief consistent with theory of claim reflected in petition may be granted under a general prayer.

16 Cases that cite this headnote

#### [5] **Appeal and Error**

Objections to verdict and findings

#### **Appeal and Error**

On trial by court or referee or in equitable actions

Where a statement of facts was filed with Court of Civil Appeals, objections to findings of fact of trial court could be raised for first time on appeal, even though appellant did not make a prejudgment motion or motion for new trial on the no evidence point relied upon by Court of Civil Appeals.

#### 7 Cases that cite this headnote

## [6] Appeal and Error

Issues not addressed below in general

#### **Appeal and Error**

Applicable legal theory or standard in general

Ends of justice do not require remand in every instance where a case was tried on the wrong theory or where evidence was not fully developed.

2 Cases that cite this headnote

#### [7] Appeal and Error



Where deceptive trade practice case was tried on theory of recovery pleaded by mobile home purchaser and this theory was waived by him in Court of Civil Appeals and he did not request a trial amendment and one of the two defendants against whom judgment was had had not appealed, a remand would not have been in the interest of justice as parties could not be returned to positions they previously occupied because a remand would require a trial only against remaining defendant.

1 Cases that cite this headnote

#### **Attorneys and Law Firms**

\*676 Kuhn, Collins & Alexander, Richard W. Alexander, Austin, for petitioners.

Kendall, Randle, Finch & Osborn, Terrence Kendall, Austin, for respondent.

# Opinion

# CAMPBELL, Justice.

This case began as a deceptive trade practice case involving the sale of a mobile home. The primary question on this appeal is whether the pleadings were sufficient to allow evidence of cost of repairs. Plaintiff, Kissman, in a nonjury trial, recovered judgment against Laney, seller of the mobile home for \$1.00,

and against Bendix, the manufacturer, for \$23,748.81 plus attorney's fees and court costs. Only Bendix appealed, and the Court of Civil Appeals reversed the trial court judgment and rendered judgment that Kissman take nothing. 582 S.W.2d 471.

# The petition alleged:

- (1) Kissman ordered from Laney a modular mobile home but received a "double-wide" mobile home;
- (2) Representing "double-wide", to be "modular" was an express warranty of description under the Texas Business and Commerce Code and was a deceptive trade practice;
- (3) There were 18 defects in the home, some of which were never repaired;
- (4) The defects rendered the mobile home "unfit" as a home, breaching an implied warranty of fitness;
- (5) Their order was incorrectly taken by Laney;
- (6) The failure of Laney and Bendix to negotiate was a violation of Laney's implied warranty of merchantability;
- (7) Kissman revoked his acceptance;
- (8) Kissman sought to recover the market price of a mobile home (\$22,000.00) as warranted by Laney and Bendix and incidental and consequential damages of the cost of moving to a replacement home and expenses for temporary lodging as provided by Section 2.715, Texas Business & Commerce Code.

Kissman prayed judgment against defendants, jointly and severally, for three times the actual damages as outlined above, (\$72,000.00), attorney's fees, costs, and for such further relief to which they may be justly entitled.

Kissman, by his last witness, attempted to offer evidence on the cost of repairs. Bendix's objection, the trial court's remarks, and the witness' answer is as follows:

\*677 "MR. KENDALL: Your Honor, I would object to any attempt to introduce the prices of these particular items; that is not what the plaintiffs sued for. He has a suit on the basis he has revoked his contract and wants his money back and exemplary damages as well. He is not suing for the cost of making certain repairs.

- "THE COURT: (To Counsel) What is the purpose of making the estimate of repairs?
- "MR. KUHN: Just to show, your Honor, just how serious the matter of the damage is, the amount of money it would take to make this home a livable home.
- "THE COURT: I don't know what purpose it would serve.
- "MR. KUHN: All right. I pass the witness.
- "THE COURT: I don't see any purpose in it, but go ahead and get this covered if you want to.
- "MR. KENDALL: Your Honor, we would have a running objection on that.
- "THE COURT: Yes, the Court is not going to consider it in the lawsuit. I don't see that it will hurt anything.
  - (To the Witness) Go ahead.
- "A: The total cost
- "MR. KENDALL: Your Honor, we would have a running objection on that.
- "A: The total cost to repair this would be \$7,916.27."

In its findings of fact, the trial court found the reasonable cost of repairing the damages to be \$7,916.27, and entered judgment for three times this amount. Because Kissman did not assert a cause of action nor seek damages for cost of repairs, the Court of Civil Appeals held evidence on cost of repairs was not admissible.

- [1] Evidence of cost of repairs is not admissible if pleadings allege only the difference in the market value before and after a collision. Tinney v. Williams, 144 S.W.2d 344 (Tex.Civ.App. Amarillo 1950, no writ). Evidence of market value before and after a collision is not admissible under allegations of cost of repairs. South Plains Ready-Mix, Inc. v. McDermett, 278 S.W.2d 575 (Tex.Civ.App. Amarillo 1954, no writ).
- [2] [3] Pleadings are sufficient under the Rules of Civil Procedure if they give fair and adequate notice to the adversary. Stone v. Lawyers Title Insurance Corporation, 554 S.W.2d 183 (Tex.1977). Rule 45, T.R.C.P. provides:

Pleadings in the district and county courts shall

- (a) be by petition and answer.
- (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.

Kissman's trial pleadings do not give fair notice of a claim for reasonable and necessary cost of repairs. The variance between the pleadings and proof is substantial, misleading, and prejudicial and therefore, fatal. Stone v. Lawyers Title Insurance Corporation, supra.

- [4] The prayer for general relief is of no assistance because a prayer must be consistent with the facts stated as a basis for relief. Starr v. Ferguson, 140 Tex. 80, 166 S.W.2d 130 (1942). Only the relief consistent with the theory of the claim reflected in the petition may be granted under a general prayer.
- E Jennings v. Texas Farm Mortg. Co., 124 Tex. 593, 80 S.W.2d 931 (1935).
- [5] Kissman urges the Court of Civil Appeals should have remanded the cause for a new trial because Bendix did not make a pre-judgment motion or motion for new trial on the no evidence point relied upon by the Court of Civil Appeals. To support his position that the proper appellate predicate had not been made for an appeal, he relies on Gillespey v. Sylvia, 496 S.W.2d 234 (Tex.Civ.App. El Paso 1973, no writ) and Southwestern Mobile Homes, Inc. v. Panel Corp. of America, 373 S.W.2d 879 (Tex.Civ.App. Tyler 1963, no writ). These \*678 cases are not in point. Gillespey Was a jury case in which a motion for new trial was required prior to the Amendment of Rule 324, T.R.C.P. In Southwestern Mobile Homes no statement of facts was presented to the Court of Civil Appeals. A statement of facts was filed with the Court of Civil Appeals in this case; therefore, objections to the findings of fact can be raised for the first time on appeal. Swanson v. Swanson, 148 Tex. 600, 228 S.W.2d 156 (1950).

This brings us to the final question of whether this case should be remanded in the interest of justice.

[6] The ends of justice do not require a remand in every instance where a case was tried on the wrong theory, City of Fort Worth v. Pippen, 439 S.W.2d 660 (Tex. 1969), or where

the evidence was not fully developed, Jackson v. Ewton, 411 S.W.2d 715 (Tex.1967).

[7] This case was tried on the one theory of recovery pleaded by Kissman and this theory was waived by him in the Court of Civil Appeals. He did not request a trial amendment. Judgment of only one dollar was had against Laney who is no longer in the case. The parties cannot be returned to the positions they previously occupied because a remand would

require a trial only against Bendix. A remand would not be in the interest of justice.

The judgment of the Court of Civil Appeals is affirmed.

**All Citations** 

587 S.W.2d 675

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#### 2019 WL 1873428

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Supreme Court of Texas.

ROHRMOOS VENTURE, Eric Langford, Dan Basso, and Tobin Grove, Petitioners,

v.

UTSW DVA HEALTHCARE, LLP, Respondent

NO. 16-0006 | Argued October 31, 2018 | OPINION DELIVERED: April 26, 2019

# **Synopsis**

**Background:** Commercial tenant brought action against landlord for breach of implied warranty of suitability and breach of contract. Landlord filed counterclaims for negligence and breach of contract. The 192nd Judicial District Court, Dallas County, No. DC−10−15959, Craig Smith, J., entered judgment on jury verdict for tenant. Landlord appealed. The Dallas Court of Appeals, 559 S.W.3d 155, affirmed. Landlord sought petition for review.

Holdings: The Supreme Court, Green, J., held that:

- [1] landlord preserved issue of whether a tenant can terminate a commercial lease based on the landlord's prior material breach;
- [2] termination of a commercial lease is available as a remedy for a landlord's material breach;
- [3] landlord failed to adequately raise issue of whether the evidence was sufficient to support jury's finding that landlord materially breached the lease;
- [4] although awarded no money damages, tenant was a "prevailing party," for purposes of contractual attorney fees, as a successful counter-defendant;

[5] generalities about an attorney's experience, the total amount of fees, and the reasonableness of the fees are not sufficient to support a fee-shifting award under the lodestar method, abrogating \*\*Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co., 410 S.W.3d 889, \*\*Jeff Kaiser, PC v. State, 2016 WL 1639731, \*\*Jimoh v. Nwogo, 2014 WL 7335158, and \*\*Ferrant v. Graham Assocs. Inc., 2014 WL 1875825; and

[6] tenant's attorney's testimony was too general to support request for \$800,000 in attorney fees.

Affirmed in part, reversed in part, and remanded.

**Procedural Posture(s):** On Appeal; Judgment; Motion for Attorney's Fees.

West Headnotes (51)

#### [1] Appeal and Error

Motion for judgment notwithstanding verdict

#### **Appeal and Error**

Objections to verdict, findings, or judgment

Commercial landlord, appealing judgment following jury verdict for tenant in action for breach of contract, preserved for appellate review issue of whether a tenant can terminate a commercial lease based on the landlord's prior material breach, even though landlord did not object to the jury charge regarding material breach; jury charge did not mention termination as a remedy or ask whether tenant was entitled to terminate, landlord raised the issue in a motion to reform the judgment or, alternatively, for a new trial, as soon as trial court entered judgment authorizing termination, issue was a question of law that was not required to be resolved before jury could perform its fact-finding role, and issue was fairly subsumed in landlord's briefing on appeal.

Cases that cite this headnote

## [2] Landlord and Tenant

# Questions of law or fact

Whether a tenant can terminate a commercial lease for material breach is a question of law for the court to decide.

Cases that cite this headnote

# [3] Appeal and Error

# Nature of remedy by dismissal

Appellate courts must broadly construe issues to encompass the core questions and to reach all issues subsidiary to and fairly included within them; this mandate must be applied reasonably, yet liberally, so that the merits of an appeal are addressed whenever reasonably possible.

2 Cases that cite this headnote

#### [4] Landlord and Tenant

Suitability or fitness of premises

In a commercial lease, a landlord warrants that the property is suitable for the tenant's intended commercial purpose.

Cases that cite this headnote

# [5] Landlord and Tenant

Suitability or fitness of premises

The implied warranty of suitability in a commercial lease exists separately and apart from any obligation the landlord may have under the lease.

Cases that cite this headnote

#### [6] Landlord and Tenant

Suitability or fitness of premises

As a matter of law, the implied warranty of suitability is limited only by specific terms in the parties' commercial lease whereby a tenant expressly agrees to repair certain defects.

Cases that cite this headnote

# [7] Landlord and Tenant

Suitability or fitness of premises

Parties to a commercial lease are free to contract out of the implied warranty of suitability by expressly waiving it in their contract.

Cases that cite this headnote

#### [8] Landlord and Tenant



Termination is available as a remedy for breach of the implied warranty of suitability; the same holds true for a landlord's material breach of the commercial lease.

Cases that cite this headnote

# [9] Appeal and Error

Sufficiency of evidence; verdict, findings, and judgment

Commercial landlord, appealing judgment following jury verdict for tenant in action for breach of contract, failed to adequately raise issue of whether the evidence was sufficient to support jury's finding that landlord materially breached the lease; landlord's arguments all addressed the implied warranty of suitability, and causes of action for breach of contract and breach of the implied warranty were different and required different supporting evidence.

Cases that cite this headnote

## [10] **Costs**

Prevailing party

#### Costs

American rule; necessity of contractual or statutory authorization or grounds in equity

In Texas, as in the federal courts, each party generally must pay its own way in attorney fees; but there are certain circumstances in which the prevailing party can recover fees from the opposing party.

2 Cases that cite this headnote

#### [11] Costs

items and amount; hours; rate

When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney fees.

#### 1 Cases that cite this headnote

#### [12] **Costs**

Contracts

Ann. § 38.001.

Parties are free to contract for a fee-recovery standard either looser or stricter than that provided by the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code

Cases that cite this headnote

#### [13] Costs



Texas Civil Practice and Remedies Code did not govern determination of "prevailing party" for purposes of fee-shifting clause in commercial lease stating that "[i]n any action to enforce the terms of this Lease, the prevailing party shall be entitled to an award for its reasonable attorneys' fees"; terms of contract were different from and less stringent than statutory standard, rendering the statutory standard inapplicable. Tex. Civ. Prac. & Rem. Code Ann. § 38.001.

Cases that cite this headnote

#### [14] **Costs**

# Prevailing party

A defendant who did not recover actual damages can, for purposes of attorney fees, be a prevailing party for defending against a plaintiff's breach of contract claim when it achieves a material alteration in its legal relationship with the plaintiff; a defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues in the case.

Cases that cite this headnote

# [15] **Costs**



Tenant that sued landlord for breach commercial lease and successfully defended against landlord's breach of contract counterclaim, obtaining a take-nothing judgment as a counter-defendant, was a "prevailing party" under fee-shifting clause stating that "[i]n any action to enforce the terms of this Lease, the prevailing party shall be entitled to an award for its reasonable attorneys' fees," and thus was entitled to reasonable and necessary attorney fees, even though tenant was awarded no money damages as the original plaintiff.

Cases that cite this headnote

#### [16] **Costs**

Prevailing party

#### **Costs**

Figure 1 in the second second

To secure an award of attorney fees from an opponent, the prevailing party must prove that: (1) recovery of attorney fees is legally authorized, and (2) the requested attorney fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process.

#### 3 Cases that cite this headnote

#### [17] **Costs**

American rule; necessity of contractual or statutory authorization or grounds in equity

Under the "American Rule," a prevailing party has no inherent right to recover attorney fees from the non-prevailing party unless there is specific statutory or contractual authority allowing it.

#### 2 Cases that cite this headnote

#### [18] **Costs**



The idea behind awarding attorney fees in fee-shifting situations is to compensate the

prevailing party generally for its reasonable losses resulting from the litigation process.

Cases that cite this headnote

### [19] **Costs**



The award of attorney fees and the ability to enforce it belongs to the party, not the attorney, absent express statutory or contractual text mandating otherwise.

Cases that cite this headnote

# [20] **Costs**

ltems and amount; hours; rate

#### **Costs**

Effect of fee agreement with attorney

Because attorney fee awards are compensatory in nature, only fees reasonable and necessary for the legal representation will be shifted to the non-prevailing party, and not necessarily the amount contracted for between the prevailing party and its attorney, as a client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary.

1 Cases that cite this headnote

#### [21] **Costs**

- Items and amount; hours; rate

An amount of attorney fees incurred or contracted for is not conclusive evidence of reasonableness or necessity; the fee claimant still has the burden to establish reasonableness and necessity.

Cases that cite this headnote

#### [22] Costs

Persons entitled or liable

A party must be represented by an attorney to secure an award of attorney fees.

Cases that cite this headnote

#### [23] **Costs**

# Figure 1 Items and amount; hours; rate

The distinction between provisions awarding "reasonable and necessary" attorney fees and provisions awarding "reasonable" attorney fees is immaterial; when a claimant wishes to obtain attorney fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary.

1 Cases that cite this headnote

#### [24] **Costs**

Figure 1 in the second second

#### **Costs**

#### Duties and proceedings of taxing officer

Both the reasonableness and the necessity of attorney fees are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party.

3 Cases that cite this headnote

#### [25] Attorney and Client

Right to compensation in general

An attorney fee is "incurred" when one becomes liable for it.

Cases that cite this headnote

## [26] **Costs**

#### ltems and amount; hours; rate

When provisions authorizing shifting of attorney fees do not contain an explicit requirement that fees be "incurred," courts do not imply such a term; rather, courts evaluate whether legally sufficient evidence supports that the amount of attorney's fees awarded is reasonable and necessary for the legal representation, so that an award of such fees will compensate the prevailing party generally for its losses resulting from the litigation process.

Cases that cite this headnote

#### [27] **Costs**

#### Figure 1 in the second second

Where contractual fee-shifting provision provided no "incurred" requirement, the court would evaluate whether legally sufficient evidence supported that the amount of attorney's fees awarded was reasonable and necessary for the legal representation, so that a fee-shifting award would compensate the prevailing party generally for its losses resulting from the litigation process.

#### 1 Cases that cite this headnote

#### [28] **Costs**

# Evidence as to items

Where a court is statutorily authorized to take judicial notice of usual and customary attorney's fees, there is a rebuttable presumption that the usual and customary fees are reasonable. Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001, 38.003, 38.004.

Cases that cite this headnote

# [29] **Costs**

#### Figure 1 in the second second

The lodestar method is a focused and objective analysis of whether attorney fees sought are reasonable and necessary, yielding a base figure that reflects most factors under \*\*Arthur Andersen\*, 945 S.W.2d 812\*, and is thus presumptively reasonable; but that figure is subject to adjustment if the presumption is overcome by other factors not accounted for in the base lodestar figure.

#### 1 Cases that cite this headnote

#### [30] **Costs**

#### Evidence as to items

Generalities about an attorney's experience, the total amount of fees, and the reasonableness of the fees are not sufficient to support a feeshifting award under the lodestar method, which applies in fee-shifting situations; abrogating

Metroplex Mailing Servs., LLC v. RR

Donnelley & Sons Co., 410 S.W.3d 889, Jeff Kaiser, PC v. State, 2016 WL 1639731, Jimoh v. Nwogo, 2014 WL 7335158, and Ferrant v. Graham Assocs. Inc., 2014 WL 1875825.

Cases that cite this headnote

#### [31] **Costs**

# Figure 1 in the second second

The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate.

# 4 Cases that cite this headnote

#### [32] **Costs**

Figure 1 in the second second

#### **Costs**

#### Evidence as to items

Under the lodestar method for determining reasonable and necessary attorney fees, the fee claimant bears the burden of providing sufficient evidence of the reasonable hours worked and the reasonable hourly rate.

# 4 Cases that cite this headnote

# [33] **Costs**

#### Items and amount; hours; rate

Sufficient evidence for determining reasonable and necessary attorney fees under the lodestar analysis in a fee shifting case includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.

#### 6 Cases that cite this headnote

#### [34] **Costs**

• Items and amount; hours; rate

The lodestar calculation of attorney fees should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case; this readily administrable and objectively reasonable calculation is the standard for calculating the reasonableness and necessity of attorney fees in a fee-shifting situation.

Cases that cite this headnote

#### [35] **Costs**

- Items and amount; hours; rate

#### **Costs**

Effect of fee agreement with attorney

Because fee-shifting awards are to be reasonable and necessary for successfully prosecuting or defending against a claim, reasonableness and necessity are not dependent solely on the contractual fee arrangement between the prevailing party and its attorney; therefore, the base lodestar calculation should reflect hours reasonably expended for services necessary to the litigation, and should reflect a reasonable hourly rate for the attorney to prosecute or defend successfully against the claim at issue.

Cases that cite this headnote

#### [36] **Costs**

ltems and amount; hours; rate

There is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney fees that can be shifted to the non-prevailing party.

Cases that cite this headnote

### [37] **Costs**

ltems and amount; hours; rate

#### Costs

Effect of fee agreement with attorney

#### Costs

Evidence as to items

When fee agreements provide for arrangements other than hourly billing, the fee claimant, through its expert, has the burden of showing that the rate claimed for purposes of the base lodestar calculation reflects a reasonable market rate

given considerations in *Arthur Andersen*, 945 S.W.2d 812, including the attorney's experience and expertise, the novelty and complexity of the questions involved, any special skill required for the representation, the attorney's risk in accepting such representation, which may be reflected in a contingent fee agreement, and any other considerations that would factor into an attorney's fee negotiations if the attorney were to bill hourly.

Cases that cite this headnote

#### [38] **Costs**

- Items and amount; hours; rate

An enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method for determining reasonable and necessary attorney fees.

Cases that cite this headnote

#### [39] **Costs**

Figure 1 in the second second

The base lodestar calculation of attorney fees usually includes at least the following considerations from Arthur Andersen, 945 S.W.2d 812: the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved, the experience, reputation and ability of the lawyer or lawyers performing the services, whether the fee is fixed or contingent on results obtained, the uncertainty of collection before the legal services have been rendered, and results obtained; these considerations therefore may not be used to enhance or reduce the base calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate.

#### 3 Cases that cite this headnote

#### [40] **Costs**

Items and amount; hours; rate

#### Costs

Evidence as to items

If a fee claimant seeks an enhancement of attorney fees beyond the base lodestar calculation, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award; likewise, if a fee opponent seeks a reduction, it bears the burden of providing specific evidence to overcome the presumptive reasonableness of the base lodestar figure.

#### Cases that cite this headnote

#### [41] Costs

- Items and amount; hours; rate

In Texas courts, the base lodestar attorneyfee calculation of reasonable hours times a reasonable rate should account for any results obtained up to trial; but to the extent that the results obtained are not reflected in the base lodestar, then the fact finder may determine whether the results obtained consideration necessitates an adjustment to achieve a reasonable fee under the second step of the lodestar method.

#### Cases that cite this headnote

# [42] **Costs**

ltems and amount; hours; rate

Under the "lodestar method," the determination of what constitutes a reasonable attorney's fee involves two steps: first, the fact finder must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work, and then multiply the number of such hours by the applicable rate, the product of which is the base fee or lodestar; the fact finder may then adjust the base lodestar up or down, (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

#### Cases that cite this headnote

#### [43] **Costs**

Figure 1 in the second second

#### Costs

Duties and proceedings of taxing officer

In a jury trial requiring a determination of reasonable attorney fees, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee.

#### Cases that cite this headnote

#### [44] **Costs**

#### Evidence as to items

General, conclusory testimony devoid of any real substance will not support a fee award; thus, a claimant seeking an award of attorney fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought.

#### 1 Cases that cite this headnote

#### [45] **Costs**

Figure 1 Line 1

In a fee-shifting case, there is a strong presumption that the base lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable attorney fee.

#### Cases that cite this headnote

#### [46] **Costs**

- Items and amount; hours; rate

The second step of the lodestar method allows for the base lodestar figure to be adjusted up when considerations not already accounted for in the first step establish that the base lodestar figure represents an unreasonably low fee award, depriving fair compensation to the prevailing party's attorney; likewise, the base lodestar figure can be adjusted down when it is established, based on considerations not already accounted for in the first step, to be an unreasonably high or excessive fee award, creating a windfall for the prevailing party or its attorney.

Cases that cite this headnote

#### [47] **Costs**

- Items and amount; hours; rate

#### **Costs**

Effect of fee agreement with attorney

Pursuant to an attorney-client fee agreement, a client could ultimately owe its attorney more fees than the amount of the award shifting fees to the non-prevailing party; however, in applying the lodestar method, fact finders should be concerned with awarding reasonable and necessary fees, not with any contractual obligations that may remain between the attorney and client.

Cases that cite this headnote

#### [48] **Costs**

#### Evidence as to items

Contemporaneous billing records are not required to prove that requested attorney fees are reasonable and necessary.

Cases that cite this headnote

### [49] **Costs**

#### Evidence as to items

Although not required, billing records are strongly encouraged to prove the reasonableness and necessity of requested attorney fees when those elements are contested; creating the documents makes them available for production, provides a basis for testifying as to the

reasonableness and necessity of the requested fees, and permits cross-examination.

Cases that cite this headnote

# [50] **Costs**

#### Evidence as to items

The fact finder considering an award of attorney fees will generally not benefit from attorneys cross-examining each other point-by-point on every billable matter; parties should use discovery and pretrial procedure to evaluate attorney's fee claims and the evidence supporting them, then present to the fact finder the evidence relevant to determining a reasonable and necessary fee.

Cases that cite this headnote

# [51] **Costs**

#### Evidence as to items

Attorney's testimony that he searched through "millions" of emails and reviewed "hundreds of thousands" of papers in discovery, took more than forty depositions, and drafted a forty-page motion for summary judgment was too general to establish reasonableness and necessity of his request for \$800,000 in prevailing-party attorney fees in action for breach of commercial lease; testimony lacked sufficient detail about the work done and how much time was spent on the tasks.

Cases that cite this headnote

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

### **Attorneys and Law Firms**

James A. Pikl, Byron K. Henry, Scheef & Stone, L.L.P., Frisco, for Petitioners.

Wade Thomas Howard, Alma Fern Shields, Houston, for Respondent.

## **Opinion**

Justice Green delivered the opinion of the Court.

\*1 In this case, we must decide whether a tenant can terminate a commercial lease contract for the landlord's prior material breach. We hold that under Davidow v. Inwood North Professional Group-Phase I, 747 S.W.2d 373 (Tex. 1988), termination is a justified remedy when the landlord breaches the commercial lease. We also must consider whether the evidence offered to prove attorney's fees is sufficient under our precedent for fee-shifting awards. We hold that it is not. When a fee claimant seeks to recover attorney's fees from an opposing party, it must put on evidence of reasonable hours worked multiplied by a reasonable hourly rate, yielding a base figure that can be adjusted by considerations not already accounted for in either the hours worked or the rate. Because the record does not contain this evidence, we affirm the court of appeals' judgment in part, reverse as to the award of attorney's fees, and remand the case to the trial court for further proceedings.

## I. Background

Landlord Rohrmoos Venture executed a commercial lease with tenant UT Southwestern DVA Healthcare, LLP (UTSW), for a commercial building in Dallas, Texas. <sup>1</sup> UTSW used the commercial building for a dialysis clinic. At some point UTSW began experiencing water penetration in the building's concrete foundation and installed ceramic floor tiles because of the moisture problems.

Around September 2007, state health inspectors evaluated UTSW's dialysis clinic and criticized the facility because some ceramic floor tiles had come loose from the concrete slab and moisture could be seen under the tiles. UTSW notified Rohrmoos of the inspection results and over the following months, the two exchanged extensive communication in an attempt to diagnose and fix the issue. Neither party accepted responsibility. Multiple engineers and contractors were called in, but the issue persisted into 2009 and then began to worsen as the building apparently suffered significant water penetration.

Because UTSW viewed the commercial building as unsuitable for its intended commercial purpose, UTSW terminated its lease early, vacated the premises, and relocated

to Irving, Texas, while still allegedly owing approximately \$ 250,000 in unpaid rent. UTSW then sued Rohrmoos and the joint-venturers behind it for breach of contract and breach of the implied warranty of suitability. UTSW also sought declaratory judgment that: (1) a casualty occurred in accordance with the lease, (2) Rohrmoos failed to remedy the casualty, and (3) UTSW had the right to terminate the lease. Rohrmoos answered with several affirmative defenses, including waiver and prior material breach. Rohrmoos also counterclaimed for negligence and breach of contract. UTSW asserted its own affirmative defenses to Rohrmoos's counterclaims.

The case was submitted to a jury. The jury found that UTSW and Rohrmoos both failed to comply with the lease, that Rohrmoos failed to comply first, and that Rohrmoos breached the implied warranty of suitability. Although UTSW initially sought money damages, it did not submit that claim to the jury. Accordingly, no money damages were awarded to UTSW.

\*2 Regarding attorney's fees, the parties' lease agreement provided for a fee-shifting arrangement whereby "the prevailing party shall be entitled to an award for its reasonable attorneys' fees" from the non-prevailing party "[i]n any action to enforce the terms of [the] Lease." In an attempt to prove the reasonableness and necessity of the requested attorney's fees at trial, UTSW's attorney, Wade Howard, testified that he had twenty years of litigation experience, the standard rate he charges is \$ 430 per hour, he has handled cases similar in nature to this one before, and a reasonable and necessary number of hours to spend on this case would be around 750 to 1,000. Those hours multiplied by his standard hourly rate equals between \$322,500 and \$400,000, so he testified that a reasonable and necessary fee would be between \$ 300,000 and \$400,000. But then Howard went on to state, "This case, for whatever reason, has not been worked up in a reasonable fashion.... But because of that, the fees in this case are much closer -- my fees are much closer to 800 -- over \$800,000." He gave some examples of why the cost of this litigation was so high—searching through "millions" of emails and reviewing "hundreds of thousands" of documents during discovery, over forty depositions taken, and a forty-page motion for summary judgment. Howard did not explain how much time was spent on each of those tasks, however, and it was clear that not all the tasks he performed were included in his testimony. Rather, he stated that the factors relevant to his attorney's fees were (1) the amount in controversy, (2) the complexity of the case, and (3) his knowledge and experience—three of

the eight factors set out in Arthur Andersen & Co. v. Perry

*Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The jury determined reasonable attorney's fees for both UTSW and Rohrmoos at \$800,000 for representation in the trial court, \$150,000 in the court of appeals, and \$75,000 for representation in this Court.

The trial court entered final judgment against Rohrmoos, stating:

- 1. [Rohrmoos] materially breached the lease agreement first.
- 2. [Rohrmoos] breached the implied warranty of suitability.
- Because [Rohrmoos] materially breached the lease agreement first and breached the implied warranty of suitability, UTSW had the right to terminate the lease agreement.
- 4. Rohrmoos Venture takes nothing on all of its claims against UTSW and Counter-Defendants....

The trial court awarded UTSW attorney's fees in the amount determined by the jury—totaling \$ 1,025,000 with the conditional appellate awards. Rohrmoos moved to reform the judgment or, alternatively, for a new trial. The trial court denied the motion.

Because the trial court's judgment authorized UTSW to terminate the commercial lease, Rohrmoos, on appeal, attacked the jury's finding that it breached the implied warranty of suitability established under Davidow. See Davidow, 747 S.W.2d at 377 (holding that "there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose"). Rohrmoos reasoned that unless Davidow is waived under the lease or the lease contains a provision that supersedes Davidow's implied warranty of suitability, a tenant can terminate a commercial lease only by proving a breach of the implied warranty of suitability. Otherwise, posited Rohrmoos, why would a commercial tenant go through the rigors of proving a Davidow breach if instead it could obtain the same remedy-termination-by merely convincing a jury that the landlord had materially breached the lease? Rohrmoos therefore devoted most of its briefing to challenging the jury's finding that it breached Davidow's implied warranty of suitability. Rohrmoos did not challenge the jury's finding that it materially breached the lease.

The court of appeals initially missed Rohrmoos's primary argument under *Davidow*, largely because Rohrmoos did not brief the *Davidow* issue fully. On this point, the court of appeals held:

All of [Rohrmoos's Davidow arguments] are irrelevant unless Rohrmoos also defeats the answers to questions one through three [of the jury charge], which support [UTSW]'s prior material breach of contract defense to Rohrmoos's counterclaim. But, as discussed later, Rohrmoos does not properly challenge the sufficiency of the evidence to support the jury's breach of contract findings. And unchallenged jury findings are binding on this court.

559 S.W.3d 155, 160 (Tex. App.—Dallas 2015, pet. granted) (mem. op.) (footnote omitted) (citation omitted).

\*3 Rohrmoos filed a motion for reconsideration, asserting that the court of appeals overlooked Rohrmoos's primary argument under *Davidow* that a material breach of contract does not support the termination of a commercial lease. The court of appeals withdrew its opinion, vacated its judgment, and published a new opinion with the following language:

Rohrmoos's motion for reconsideration improperly now argues that we should ignore the answers to Questions One through Three [of the jury charge] because the right to terminate a commercial lease for failure to make repairs exists only with respect to a breach of the implied warranty of suitability that the Supreme Court established

in Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373, 376–77 (Tex. 1988) and does not exist for a prior material breach of an express duty [to] repair contained in the lease. But Rohrmoos did not assert that objection to Questions One through Three in the trial court, or otherwise preserve the point in the trial court. See TEX. R. CIV. P. 274 ("A party objecting to a charge must

point out distinctly the matter to which he objects and the grounds of his objection.").

Id. at 163. The court of appeals decided Rohrmoos's remaining points of error against Rohrmoos and affirmed the trial court's judgment. See id. at 160–64, 169.

Regarding the \$ 1,025,000 in attorney's fees, Rohrmoos challenged the award in the court of appeals on two grounds: (1) UTSW was not a "prevailing party" under the lease and therefore was not entitled to recover attorney's fees, and (2) the evidence was insufficient to support the fee award. <sup>2</sup> Id. at 164–66. The court of appeals disagreed with Rohrmoos on both counts, holding that UTSW was a "prevailing party" under the lease, and that El Apple I, Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012), and its progeny, which use the "lodestar method" for calculating attorney's fees, do not apply in this case. 559 S.W.3d at 165–68. The court of appeals further held that billing records are not required to prove attorney's fees, and testimony about the attorney's experience, the total amount of fees, and the reasonableness of the fees complied with Arthur Andersen and supported the fee award. Id. at 167-68. Rohrmoos petitioned this Court for review, and we granted the petition. 61 Tex. Sup. Ct. J. 1505 (June 22, 2018).

#### II. Davidow's Implied Warranty of Suitability

Rohrmoos raises many arguments in this Court involving the Davidow implied warranty of suitability. Rohrmoos argues primarily that the court of appeals incorrectly assumed that a material breach of a commercial lease can justify termination, resulting in a holding that is contrary to our decision in Davidow. However, there are preservation concerns surrounding this issue, which we address first before turning to the applicability of Davidow's implied warranty of suitability.

#### A. Preservation

\*4 Rohrmoos maintains that the issue of whether a tenant can terminate a commercial lease based on the landlord's prior material breach is properly preserved for our review. Refuting

the court of appeals' holding that Rohrmoos did not object to the jury charge based on its *Davidow* theory, or otherwise preserve the point in the trial court, Rohrmoos contends that the issue is legal and not factual—meaning it can be raised at any time, including on appeal. Rohrmoos also claims that it nevertheless did raise the issue repeatedly in the trial court and correctly preserved the issue for review in the court of appeals and this Court.

UTSW, on the other hand, argues that the *Davidow* issue is not properly before this Court. First, UTSW argues that Rohrmoos did not object to the jury charge regarding material breach and assert its *Davidow* theory in the trial court, thereby waiving the right to appeal the issue. Second, even if the *Davidow* argument had been preserved in the trial court, UTSW argues that Rohrmoos did not adequately brief the issue in the court of appeals, thus waiving the issue there. And finally, UTSW asserts that Rohrmoos waived the issue in this Court by not challenging the court of appeals' application of the law on preservation and waiver in its petition for review.

Rohrmoos that the Davidow issue is preserved for our review. Importantly, the availability of termination as a remedy did not become an issue until the trial court entered judgment authorizing termination. When that happened, Rohrmoos promptly filed a motion to reform the judgment or, alternatively, for a new trial. In that motion, Rohrmoos asserted that "under Texas law, a tenant claiming material breach of lease is not entitled to terminate the lease unless the lease expressly provides for that remedy." Rohrmoos cited

Davidow, saying that "[t]his is still the law in Texas today." This gave the trial court notice of Rohrmoos's complaint that the verdict and judgment were at least partially based on a theory of recovery that Rohrmoos contends did not support termination as a matter of law. Cf. United Scaffolding, Inc. v. Levine, 537 S.W.3d 463, 482 (Tex. 2017) (holding that the preservation requirement was satisfied because the defendant raised the issue of an improper theory of recovery that could not support the judgment in a motion for judgment notwithstanding the verdict). Regarding the jury charge, there was no need to object because it did not mention termination as a remedy or ask whether UTSW was entitled to terminate.

[2] Furthermore, whether a tenant can terminate a commercial lease under Davidow for material breach is

a question of law for the court to decide, and it is not one which must be resolved before the jury can properly perform

its fact-finding role. See Holland v. Wal-Mart Stores, Inc., 1 S.W.3d 91, 94 (Tex. 1999) (per curiam) (holding that a party's failure to object at the charge conference regarding attorney's fees was not fatal because "[t]he availability of attorney's fees under a particular statute is a question of law for the court" and is not one that must be answered before the jury can properly determine the facts in the case). A jury can determine whether there was a breach of contract, which party breached first, and whether there was a breach of the implied warranty of suitability—as the jury did here—and it can do all of this whether or not termination is an available remedy under Davidow for material breach of a commercial lease.

Additionally, the record indicates that Rohrmoos raised its argument under Davidow in the trial court. In a trial brief, Rohrmoos stated specifically that a commercial tenant "may not terminate the lease" unless it proves a breach of the implied warranty of suitability. Likewise, during trial, Rohrmoos's counsel explained:

\*5 Their allegation on [breach of contract] is that the landlord failed in his duty to repair, that's their allegation. Under Texas law, that does not entitle a party to terminate the contract. It entitles them to repair it and then to collect back from the landlord, there's an offset for rent.... So, if we breached because we did not do repairs, if that's what the jury agrees to, it does -- they aren't entitled to terminate, that's a remedy they aren't entitled to. They're entitled to damages.

When the trial court pressed for case law supporting this position, Rohrmoos's counsel responded, "I'm hanging my hat on *Davidow*, ... [which says] as a matter of Texas law, a breach of the duty to repair is only remediable by damages." In no sense can we say that Rohrmoos failed to inform the trial court of its theory under *Davidow*. Indeed, our law on preservation is built almost entirely around putting the trial

court on notice so that it can cure any error. See Burbage v. Burbage, 447 S.W.3d 249, 258 (Tex. 2014) ("Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error." (citing In re B.L.D., 113 S.W.3d 340, 350 (Tex. 2003))). Affording trial courts an opportunity to correct errors conserves judicial resources and prevents an appeal by ambush or otherwise having to order a new trial. Id. Here, there is no such concern because the trial court was given an opportunity to cure any error when it entered judgment and later in response to Rohrmoos's post-judgment motion. Rohrmoos properly preserved this issue in the trial court.

[3] Rohrmoos also raised the argument in the court of appeals. We have firmly mandated that courts broadly construe issues to encompass the core questions and to reach all issues subsidiary to and fairly included within them. See Ditta v. Conte, 298 S.W.3d 187, 190 (Tex. 2009); see also TEX. R. APP. P. 38.9 ("Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with [briefing rules] is sufficient..."). This mandate must be applied "reasonably, yet liberally," so that the merits of an appeal are addressed whenever "reasonably possible." Ditta, 298 S.W.3d at 190 (citing Perry v. Cohen, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam)). Fairly subsumed in Rohrmoos's briefing to the court of appeals is the challenge to the trial court's judgment based on Rohrmoos's contention that, under Davidow, UTSW was not entitled to terminate the lease based on the landlord's prior material breach. <sup>3</sup> The argument also clearly appears in Rohrmoos's reply brief to the court of appeals, although that is neither controlling nor dispositive regarding a litigant's duty to brief issues before appellate courts. <sup>4</sup> See TEX. R. APP. P. 38.1(f) (stating that the appellant's opening brief "must state concisely all issues or points presented for review"). And while Rohrmoos may not have briefed *Davidow*'s holding as a specifically enumerated issue, we have long rejected any form-over-substance approach that leads to a rigid application of our preservation rules. See Thota v. Young, 366 S.W.3d 678, 690 (Tex. 2012); see also Burbage, 447 S.W.3d at 258 (holding that our "procedural rules are technical, but not trivial," and courts must "construe such rules liberally so that the right to appeal is not lost unnecessarily"). The

entirety of Rohrmoos's briefing rests on the premise that Davidow does not allow UTSW to terminate the lease for Rohrmoos's material breach. This was sufficient to put the court of appeals on notice of Rohrmoos's understanding regarding Davidow, and to invite the court of appeals to correct any error of law as to Davidow and the availability of termination as a remedy.

\*6 Rohrmoos likewise adequately presented the argument in its petition for review and briefing in this Court. We now turn to the merits of Rohrmoos's Davidow argument and the availability of termination for material breach of a commercial lease.

#### **B.** Remedy of Termination

Rohrmoos's position is that *Davidow* expressly prohibits termination as a remedy for material breach of a commercial lease. All this Court said in *Davidow*, however, is that there is an implied warranty of suitability in commercial leases, and what the implied warranty means:

Therefore, we hold there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose. This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

747 S.W.2d at 377. The Court did not, as Rohrmoos contends, make an absolute statement that a material breach

of a commercial lease will never justify termination. In fact, if anything, the holding in *Davidow* leans the other way.

In Davidow, this Court addressed the implications of independent covenants in our property law, concluding that they were antiquated and unworkable in the modern lease setting. See id. at 375–77. The opinion begins with the observation that "[a]t common law, the lease was traditionally regarded as a conveyance of an interest in land, subject to the doctrine of caveat emptor." Id. at 375. Once the landlord delivered the right of possession to the tenant, the tenant had a duty to pay rent as long as he was in possession.

Id. This was true "even if the buildings on the leasehold were destroyed or became uninhabitable." Id. All lease covenants at common law were thus considered independent because the tenant, being in possession of everything he was entitled to under the lease, had to pay rent no matter what lease covenant the landlord breached.

This outdated common law concept, \*\*Davidow\* noted, \*\*is no longer indicative of the contemporary relationship between the tenant and landlord." \*\*Id.\* at 376. Therefore, this Court first did away with independent covenants in residential leases in \*\*Kamarath v. Bennett, 568 S.W.2d 658, 660–61 (Tex. 1978), superseded by statute, Act of May 28, 1979, 66th Leg., R.S. ch. 780, §§ 1–18, 1979 Tex. Gen. Laws 1978. In that case, the Court implicitly held that the residential tenant's obligation to pay rent is dependent upon the landlord's performance under the then newly created warranty of habitability. See \*\*id.\*\*

The Court then extended **Kamarath**'s reasoning to commercial leases in **Davidow**:

We recognized in *Kamarath* that the primary objective underlying a residential leasing arrangement is "to furnish [the tenant] with quarters suitable for living purposes." The same objective is present in a commercial setting. A commercial tenant desires to lease premises suitable for their intended commercial use. A commercial landlord impliedly represents that the premises are in fact suitable for that use and will remain in a suitable condition. The tenant's obligation to pay rent and the landlord's implied warranty of suitability are therefore mutually dependent.

\*7 747 S.W.2d at 377 (alteration in original) (citation omitted). Although the last sentence refers to the tenant's obligation to pay rent as being dependent on the landlord's implied warranty of suitability, there is no reason to conclude that the Court in Davidow did not intend to extend that same dependency to the landlord's obligations under the lease.

Indeed, the courts of appeals that have addressed a landlord's material breach in residential lease settings have held that termination is an available remedy. See, e.g., Pala v. Maxim, No. 01-01-00618-CV, 2002 WL 188567, at \*4-5 (Tex. App. -Houston [1st Dist.] Feb. 7, 2002, no pet.) (not designated for publication) (holding that the tenant was excused from all obligations to perform under the lease when the landlord materially breached the lease by not replacing the countertops in the premises). And the courts of appeals that have addressed this issue in commercial lease settings have held the same. See, e.g., Clark v. Porter, No. 04-08-00520-CV, 2009 WL 2618359, at \*3-4 (Tex. App.—San Antonio Aug. 26, 2009, pet. denied) (mem. op.) (noting that the tenant's obligations under the commercial lease could terminate and be excused by the landlord's earlier material breach); Parts Indus. Corp. v. A.V.A. Servs., Inc., 104 S.W.3d 671, 680-81 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.) (approving the tenant's proper use of non-payment of rent as a remedy for breach of the landlord's express obligations under the commercial lease to repair a leaky roof). Rohrmoos cites no authority that has interpreted Davidow to mean that a tenant cannot terminate a commercial lease for material breach of the contract. This is because there is none, and we see no reason to hold otherwise.

[4] for the proposition that in a commercial lease, a landlord warrants that the property is suitable for the tenant's intended commercial purpose. 747 S.W.2d at 377. This implied warranty exists separately and apart from any obligation the landlord may have under the lease. See id. As a matter of law, the implied warranty is limited only by specific terms in the parties' commercial lease whereby a tenant expressly agrees to repair certain defects. Id. Parties are also free to contract out of the implied warranty by expressly waiving it in their contract. See Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 912 (Tex. 2007) (holding that an "as is" clause that expressly waived *Davidow*'s implied warranty of suitability was sufficient to waive the implied warranty). Termination is available as a remedy for breach of the implied warranty of suitability. See Davidow, 747 S.W.2d at 377. The same holds true for a landlord's material breach of the commercial lease.

Because we agree with the court of appeals that Rohrmoos did not properly preserve its challenge as to UTSW's breach of contract claim, as discussed below, 5 the jury's finding that Rohrmoos materially breached the lease stands, and we cannot disturb that part of the trial court's judgment. We need not and do not address Rohrmoos's remaining arguments regarding the implied warranty of suitability under

Pavidow. 6

#### III. Breach of Commercial Lease

\*8 [9] After the court of appeals issued its opinion holding that Rohrmoos did not properly challenge the sufficiency of the evidence supporting the jury's breach of contract finding, Rohrmoos argued in its motion for reconsideration in the court of appeals that it did, in fact, challenge the jury's finding that Rohrmoos materially breached the lease. That is, notwithstanding Rohrmoos's clear headings in its opening briefing to the court of appeals and ensuing arguments—all challenging the implied warranty of suitability—Rohrmoos claims that the evidence UTSW used to prove that Rohrmoos breached the implied warranty of suitability is the same evidence UTSW used to prove that Rohrmoos materially breached the lease. A challenge to one is a challenge to all, argues Rohrmoos.

[8] To be clear, Pavidow standye disagree. At no point in its briefing to the court of appeals did Rohrmoos challenge the sufficiency of the evidence with respect to the jury's finding that Rohrmoos materially breached the lease. Nothing in Rohrmoos's briefing put the court of appeals on notice of such a challenge, even when read liberally. Moreover, we are not prepared to do away with our preservation requirements altogether by holding that Rohrmoos's challenge to the evidence supporting a breach of the implied warranty of suitability fairly subsumes a challenge to the evidence supporting a breach of contract. The two causes of action are different, each with entirely different elements that must be specifically pled, argued, and proved with supporting evidence. A challenge as to whether the plaintiff satisfied its burden of proof for one cause of

action does not, by implication, challenge the evidence as to a separate cause of action. Had Rohrmoos not intended to base its challenge solely on *Davidow*, it should have argued alternative theories in the court of appeals to include a sufficiency challenge regarding material breach. Rohrmoos did not do so. This issue is not preserved for our review.

#### IV. Attorney's Fees

[11] In Texas, as in the federal courts, each party generally must pay its own way in attorney's fees. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 550, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010) ("The general rule in our legal system is that each party must pay its own attorney's fees and expenses."); Ashford Partners, Ltd. v. ECO Res., Inc., 401 S.W.3d 35, 41 (Tex. 2012) ("As a general rule, litigants in Texas are responsible for their own attorney's fees and expenses in litigation."). But there are certain circumstances in which the prevailing party can recover fees from the opposing party. See Baker Botts LLP v. ASARCO LLC, — U.S. ——, 135 S.Ct. 2158, 2164, 192 L.Ed.2d 208 (2015) ("Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252-53, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010))); In re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding) ("Texas follows the American rule on attorney's fees, which provides that, generally, 'a party may not recover attorney's fees unless authorized by statute or contract.' " (quoting Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, 489 S.W.3d 448, 453 n.4 (Tex. 2016))). When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees. See, e.g., Kinsel v. Lindsey, 526 S.W.3d 411, 427 (Tex. 2017) ("The party seeking recovery bears the burden of proof to support the award."); Nat'l Lloyds, 532 S.W.3d at 809 ("When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing the fees are reasonable and necessary." (citing *In re Bent*, 487 S.W.3d 170, 184 (Tex. 2016) (orig. proceeding); Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991))).

\*9 With that in mind, we consider the two arguments Rohrmoos raises against the \$ 1,025,000 award of attorney's fees. First, Rohrmoos argues that UTSW is not a "prevailing party" under this Court's precedent and is therefore not entitled to attorney's fees. Second, even if UTSW could be considered a prevailing party, Rohrmoos contends there was legally insufficient evidence to support UTSW's award of attorney's fees. We address each in turn.

## A. Prevailing Party

The parties' contract provided that "[i]n any action to enforce the terms of this Lease, the prevailing party shall be entitled to an award for its reasonable attorneys' fees." The lease did not further define the term "prevailing party." Rohrmoos cites our decision in Intercontinental Group Partnership v. KB Home Lone Star LP, 295 S.W.3d 650 (Tex. 2009), to assert that courts should apply section 38.001 of the Texas Civil Practice and Remedies Code when a contract leaves the term "prevailing party" undefined. See \_\_id. at 653 (analyzing the applicability of Chapter 38 to a contract that did not define the term "prevailing party"); see also TEX. CIV. PRAC. & REM. CODE § 38.001(8) ("A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for ... an oral or written contract."). We have held that "[t]o recover attorney's fees under section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 390 (Tex. 1997). But here, no damages were sought or awarded under the jury charge.

[12] [13] Although instructive, Chapter 38 and \*\*Green International\* are not controlling in this case. "Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's." \*\*KB Home, 295 S.W.3d at 653. The commercial lease here plainly states that "[i]n any action to enforce the terms of this Lease, the prevailing party shall be entitled to an award for its reasonable attorneys' fees." Nothing in that contract provision requires that a party receive any damages, as we have held is required under Chapter 38. See \*\*Green Int'l, 951 S.W.2d at 390. The operative event under the contract is that a party prevail "[i]n any action to enforce the terms of [the] Lease." That

is sufficiently different and less stringent than Chapter 38's standards, rendering section 38.001 inapplicable. The question remains, however, whether UTSW is a prevailing party under the contract when it did not seek or obtain monetary damages.

In KB Home, we considered whether the plaintiff prevailed for purposes of attorney's fees when the jury found that the defendant violated the contract but awarded no money damages to the plaintiff. 295 S.W.3d at 652. Like the commercial lease in this case, the contract in KB Home did not define "prevailing party." Id. We held, after looking to the plain meaning of the term "prevailing party," that the plaintiff did not prevail for purposes of attorney's fees because to prevail requires a plaintiff to "prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief." Id. The plaintiff recovered no damages, secured no declaratory or injunctive relief, obtained no consent decree or settlement in its favor, and received nothing of value of any kind. L. Id. at 655. No misconduct was deterred or punished, nor did we "perceive any manner in which the outcome materially altered the legal relationship between" the plaintiff and defendant. 

Id. (citing Farrar v. Hobby, 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), which held that to prevail for a claimant means obtaining actual and meaningful relief, something that materially alters the legal relationship of the parties). KB Home, the plaintiff, sought more than \$ 1,000,000 in damages, but instead left the courthouse with nothing. Id.

\*10 At first blush, \*\*KB Home's holding appears damning to UTSW, but in that case we examined only what a plaintiff must prove to be a "prevailing party." See \*\*id.\* at 652 (holding that "a plaintiff must prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief"). Here, although UTSW was the original plaintiff, it argues that it successfully defended \*\*—as a defendant\*—against Rohrmoos's breach of contract counterclaim. This is true. In an attempt to relieve itself of its future obligations to perform under the contract, UTSW sought a jury finding that Rohrmoos breached the lease first. The jury found that both Rohrmoos and UTSW breached the lease but that Rohrmoos breached first. The trial court

entered judgment accordingly and ordered that Rohrmoos take nothing on its counterclaim for approximately \$ 250,000 in back rent. The court of appeals employed this logic to hold that UTSW, as counter-defendant, was the prevailing party because it was vindicated by the court's judgment. 559 S.W.3d at 166 (citing Johnson v. Smith, No. 07-10-00017-CV, 2012 WL 140654, at \*3 (Tex. App.—Amarillo Jan. 18, 2012, no pet.) (mem. op.)).

[14] Interestingly, this specific question regarding prevailing

defendants presented itself in KB Home, but we did not address it because it was not preserved for our review. See 295 S.W.3d at 659 ("The issue of whether a breachingbut-nonpaying defendant can be a 'prevailing party' under an attorney's-fees provision like this is interesting legally, but not before us procedurally."). We did hold, however, that to prevail means to "obtain actual and meaningful relief, something that materially alters the parties' legal relationship." Id. at 652 (citing Farrar, 506 U.S. at 111–12, 113 S.Ct. 566). Since *KB Home*, courts of appeals have held that a defendant who did not recover actual damages can be a prevailing party for defending against a plaintiff's breach of contract claim when it achieves a material alteration in its legal relationship with the plaintiff. See, e.g., SEECO, Inc. v. K.T. Rock, LLC, 416 S.W.3d 664, 674 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that a successful breach of contract defense entitled the defendant to attorney's fees as the prevailing party); Fitzgerald v. Schroeder Ventures II, LLC, 345 S.W.3d 624, 629 (Tex. App. —San Antonio 2011, no pet.) (concluding that there was no basis for denying the defendants attorney's fees under the contract with a "prevailing party" provision after analyzing and agreeing with another intermediate appellate court that held KB Home did not apply to attorney's fees sought by a defendant defending against a claim for breach of contract).

[15] We agree. A defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a takenothing judgment on the main issue or issues in the case. Our holding is consistent with the United States Supreme Court's interpretation of what it means to prevail as a defendant. See \*\*CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n, — U.S. —, 136 S.Ct. 1642, 1651, 194 L.Ed.2d 707 (2016) ("The defendant may prevail even

if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."). Here, UTSW was not just a plaintiff; it also successfully defended against Rohrmoos's breach of contract counterclaim, and the trial court rendered a takenothing judgment in UTSW's favor as a counter-defendant. The jury's finding and the trial court's judgment altered the legal relationship between the parties. UTSW is therefore a "prevailing party" under the lease and is entitled to reasonable and necessary attorney's fees.

## **B.** Legal Sufficiency

The jury awarded \$ 800,000 in attorney's fees for trial work and conditional fee awards of \$ 150,000 for appeal to the intermediate appellate court and \$ 75,000 for appeal to this Court. The trial court's judgment awarded UTSW fees according to the verdict and ordered that Rohrmoos take nothing. In this Court, Rohrmoos challenges the evidence offered by UTSW's attorney, Wade Howard, as legally insufficient to support the fee awards, claiming that the lodestar method applies and Howard should have submitted detailed proof, likely in the form of billing records, so the jury could have conducted a meaningful review to determine the reasonableness of the fees. Howard did not attempt to introduce billing records into evidence, nor did he testify to the details of his work, which Rohrmoos claims prevented the jury from determining whether the hundreds of hours spent were reasonable or necessary. Rohrmoos asserts that this award of more than \$ 1,000,000 in attorney's fees cannot be based on the *ipse dixit* of the testifying expert. UTSW, on the other hand, argues that Howard's testimony is sufficient to support the fee award under Arthur Andersen because Howard testified to the total amount of fees, the reasonableness of the fees, and his experience.<sup>7</sup>

\*11 [16] Before addressing the parties' arguments and the evidence presented in this case, we first examine the law governing attorney's fees in a fee-shifting situation. In short, to secure an award of attorney's fees from an opponent, the prevailing party must prove that: (1) recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process.

## 1. Legally Authorized

[17] Legal authorization begins, as we have mentioned, with the American Rule, which provides that a prevailing party has no inherent right to recover attorney's fees from the non-prevailing party unless there is specific statutory or contractual authority allowing it. *E.g.*, *Nat'l Lloyds*, 532 S.W.3d at 809; *Tony Gullo Motors I, LP v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006) (observing that Texas law has followed the American Rule for more than a century). When fee-shifting is authorized, whether by statute or contract, there are a few key principles that serve as the basis for our attorney's fee jurisprudence.

[19] First, the idea behind awarding attorney's fees [18] in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process. See generally In re Nalle Plastics Family Ltd. P'ship, 406 S.W.3d 168, 173 (Tex. 2013) (orig. proceeding) (observing that although attorney's fees are not awarded as damages, they can be viewed as compensating the prevailing party for its losses because the award helps make the party whole). The award and the ability to enforce it thus belongs to the party, not the attorney, absent express statutory or contractual text mandating otherwise. See, e.g., TEX. FAM. CODE § 6.708(c) (providing that the court may award reasonable attorney's fees and expenses in suits for the dissolution of marriage, and "[t]he court may order the fees and expenses and any postjudgment interest to be paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt").

[20] [21] Second, because such fee awards are compensatory in nature, fee-shifting is not a mechanism for greatly improving an attorney's economic situation. *Cf.* 

Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (noting that fee-shifting statutes are enacted to "enable private parties to obtain legal help in seeking redress for injuries" and not to improve significantly the financial lot of attorneys as a form of economic relief, "nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client"). Thus, only fees reasonable and necessary for the legal representation will be shifted to the non-prevailing party, and not necessarily the amount

contracted for between the prevailing party and its attorney, as a client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary. See Arthur Andersen, 945 S.W.2d at 818 ("[W]e cannot agree that the mere fact that a party and a lawyer have agreed to a contingent fee means that the fee arrangement is in and of itself reasonable for purposes of shifting that fee to the defendant."). Stated differently, an amount incurred or contracted for is not conclusive evidence of reasonableness or necessity. See id. The fee claimant still has the burden to establish reasonableness and necessity.

Nat'l Lloyds, 532 S.W.3d at 809.

\*12 [22] Third, a party must be represented by an attorney to secure an award of attorney's fees. For example, courts have held that a corporate client can be awarded fees for representation by its in-house counsel. See, e.g., Tesoro Petrol. Corp. v. Coastal Ref. & Mktg., Inc., 754 S.W.2d 764, 766-67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("[T]he award of reasonable attorney's fees for services performed by in-house counsel compensates the prevailing party for time counsel could have spent on other corporate matters." (citing \*\* Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1396–97 (7th Cir. 1983))). Likewise, courts have held that a law firm can be awarded fees for representation by its own attorney. See, e.g., Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 400 (5th Cir. 1989) (citing *Tesoro* to hold that "[i]ust as the corporation should be entitled to compensation for the time which inhouse counsel could have spent on other corporate matters, so is a law firm entitled to compensation for the time which the representing attorney could have spent on other client matters"). Attorneys have been awarded fees for their own pro se representation. <sup>8</sup> E.g., Beckstrom v. Gilmore, 886 S.W.2d 845, 847 (Tex. App.—Eastland 1994, writ denied) (awarding fees to an attorney representing himself pro se). But see Jackson v. State Office of Admin. Hearings, 351 S.W.3d 290, 299–300 (Tex. 2011) (denying attorney's fees to a pro se attorney because the attorney did not incur the fees as required by the applicable statute). And the State of Texas can be awarded fees under certain statutes for representation by Attorney General's Office attorneys. See, e.g., TEX. GOV'T CODE § 402.006(c) ("In a case in which the state is entitled to recover a penalty or damages the attorney general

is entitled, on behalf of the state, to reasonable attorney's

fees and court costs."); Merchs. Fast Motor Lines, Inc. v. State, 917 S.W.2d 518, 523–24 (Tex. App.—Waco 1996, writ denied) (upholding the State's attorney's fee award under section 402.006(c)).

Here, the parties' contract provides for a fee-shifting arrangement by stating, "In any action to enforce the terms of this Lease, the prevailing party shall be entitled to an award for its reasonable attorneys' fees." The contract does not define "reasonable" attorney's fees, so we turn to our attorney's fee jurisprudence in considering reasonableness.

#### 2. Reasonable and Necessary

[23] [24] As an initial matter, we note that parties in their contracts and the Legislature in its enabling statutes will often loosely employ a reasonable and necessary standard, sometimes using both terms "reasonable and necessary" and other times just "reasonable." Compare TEX. BUS. & COM. CODE § 17.50(d) ("Each consumer who prevails [under the Deceptive Trade Practices Act] shall be awarded court costs and reasonable and necessary attorneys' fees."), with TEX. CIV. PRAC. & REM. CODE § 38.001 (providing that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs" for, among other things, breach of contract). The distinction between such provisions is immaterial. When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. See Nat'l Lloyds, 532 S.W.3d at 809 (stating that a party seeking recovery of attorney's fees from the losing party "bears the burden of establishing the fees are reasonable and necessary" (emphasis added)). Both elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party. See Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 231 (Tex. 2010) (observing that generally the reasonableness of particular fees presents a fact question that the fact finder must decide, as does necessity); see also Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998) (explaining that reasonableness is a question of fact for the jury, and that "[t]he second limitation, that fees must be necessary, is likewise a fact question" (citing *Gen. Motors* Corp. v. Bloyed, 916 S.W.2d 949, 961 (Tex. 1996))).

[27]

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\*13 [25]

statutes have an explicit reference to attorney's fees that are "incurred." See, e.g., TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1) (allowing the recovery of "reasonable attorney's fees and costs of court incurred by the physician or health care provider" for certain situations under the Texas Medical Liability Act); id. § 27.009(a)(1) (providing for recovery of "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require" under the Texas Citizens Participation Act). In those instances, we have held that the word "incurred," just as the word "reasonable," acts to limit the amount of fees the court may award, and "[a] fee is incurred when one becomes liable for it." Garcia v. Gomez, 319 S.W.3d 638, 642 (Tex. 2010) (holding that "[b]oth the adjective 'reasonable' and the verb 'incurred' [in section 74.351(b)(1)] act to limit the amount of attorney's fees the trial court may award"); see also Jackson, 351 S.W.3d at 299-300 (denying a pro se attorney fees under the Texas Public Information Act, which has an "incurred" requirement, because he "did not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees"). As we have explained, attorney's fee awards are compensatory in nature, intended generally to make the prevailing party whole as to reasonable and necessary fees for successfully prosecuting or defending against a claim. See Nalle Plastics, 406 S.W.3d at 173. But when statutes do not contain an explicit requirement that fees be "incurred," e.g., TEX. CIV. PRAC. & REM. CODE § 38.001, we do not imply such a term; rather, we evaluate whether legally sufficient evidence supports that the amount of attorney's fees awarded is reasonable and necessary for the legal representation, so that an award of such fees will compensate the prevailing party generally for its losses resulting from the litigation process. See, e.g., Long v. Griffin, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam). And when contracts provide for recovery of attorney's fees, we similarly do not imply terms but adhere to the parties' intent as expressed in the language of the contract. See URI, Inc. v. Kleberg Cty., 543 S.W.3d 755, 763 (Tex. 2018) (noting that "our primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument"). Here, because there is no "incurred" requirement on the face of the contract, we evaluate whether legally sufficient evidence supports that the amount of attorney's fees awarded is reasonable and necessary for the legal representation, so that a fee-shifting

award will compensate the prevailing party generally for its [28] Furthermore, some enablinglosses resulting from the litigation process.

Historically, claimants have proven reasonableness and necessity of attorney's fees through an expert's testimonyoften the very attorney seeking the award—who provided a basic opinion as to the requested attorney's fees. See generally Penn Mut. Life Ins. v. Maner, 101 Tex. 553, 109 S.W. 1084, 1084 (1908). In recent years, Texas law has developed with references to the Arthur Andersen method (sometimes referred to as the "traditional" method) and the lodestar method for proving the reasonableness and necessity of attorney's fees. See, e.g., Metroplex Mailing Servs., 410 S.W.3d at 900 (suggesting that "[u]nder the traditional method of awarding fees, [as opposed to the lodestar method,] documentary evidence is not a prerequisite"). The court of appeals in this case referenced both methods, distinguishing them and concluding that "Rohrmoos does not assert, and the record does not show, that the lodestar method was statutorily required or that [UTSW] 'chose to prove up attorney's fees using this method.' " 559 S.W.3d at 167 (citations omitted). The court of appeals then affirmed the attorney's fee award, holding that "Howard's testimony concerning his experience, the total amount of fees, and the reasonableness of the fees charged was sufficient to support the award" under Arthur Andersen. Id. at 168.

These two seemingly different methods for evaluating claims for attorney's fees have created confusion for practitioners and courts alike. As explained below, however, the lodestar method developed as a "short hand version" of the \*\*Arthur Andersen\* factors and was never intended to be a separate test or method. With that in mind, we clarify the law governing recovery of attorney's fees in Texas courts. We begin by reviewing fee-shifting and attorney's fee jurisprudence in the federal courts.

## a. Johnson Factors and Lodestar in Federal Courts

\*14 To assist district courts in awarding attorney's fees, the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), set out twelve factors that a court should consider in determining a reasonable fee.

Id. at 717–19. Those factors, consistent with the American

Bar Association's Code of Professional Responsibility then in effect, included:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

3088.

E.g., Reynolds v. Coomey, 567 F.2d 1166, 1167 (1st Cir. 1978) (observing that the district court properly applied the Johnson factors as a guide in determining the amount of attorney's fees); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 884 (8th Cir. 1977) (approving the Johnson factors for determining the reasonableness of attorney's fee claims). But as the United States Supreme Court observed, this method "gave very little actual guidance to district courts" and "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results."

Del. Valley Citizens' Council, 478 U.S. at 563, 106 S.Ct.

For this reason, the Third Circuit developed the lodestar method for calculating reasonable attorney's fees. See

Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp. (Lindy I), 487 F.2d 161, 167–68 (3d

Cir. 1973); see also Del. Valley Citizens' Council, 478 U.S. at 563-65, 106 S.Ct. 3088 (providing a historical analysis of the development of the lodestar method). This method involved two steps. See Lindy I, 487 F.2d at 167–68. First, for each attorney involved, the court was to multiply the hours reasonably spent on the case by a reasonable hourly rate of compensation to form a base number or "lodestar." Id. Second, the court could then adjust this lodestar figure to account for whether the expenses incurred and hours invested were based on a contingent agreement (i.e., without assurances of compensation), as well as the quality of the work performed, as evidenced by the recovery obtained and complexity of the case. See Lindy Bros. Builders, Inc. of Phil. v. Am. Radiator & Standard Sanitary Corp. (Lindy II), 540 F.2d 102, 117 (3d Cir. 1976). This lodestar formulation produced a more focused analysis than the *Johnson* factors by emphasizing the objective consideration of amount of time expended by the attorneys. See Poel. Valley Citizens' Council, 478 U.S. at 563, 106 S.Ct. 3088 (explaining that the lodestar "formulation emphasized the amount of time expended by the attorneys, and provided a more analytical framework for lower courts to follow than the unguided 'factors' approach provided by Johnson"). It also allowed for greater consistency in awards of attorney's fees, although "allowing the courts to adjust the lodestar amount based on considerations of the 'riskiness' of the lawsuit and the quality of the attorney's work could still produce inconsistent and arbitrary fee awards." Id.

\*15 The United States Supreme Court refined the lodestar method in \*\*Hensley v. Eckerhart\*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), adopting a hybrid approach for calculating reasonable attorney's fees that shared elements of both the lodestar method and \*\*Johnson\* factors. See \*\*id.\* at 433–35, 103 S.Ct. 1933. The Court explained: "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." \*\*Id.\* at 433, 103 S.Ct. 1933. The Court's analysis was consistent with the lodestar's first step described by the Third Circuit, but then the Court we went on to state: "The product of reasonable

hours times a reasonable rate does not end the inquiry. There

remain other considerations that may lead the district court to adjust the fee upward or downward...." *Id.* at 434, 103 S.Ct. 1933. The "other considerations" included, but were not limited to, the *Johnson* factors, but the Court made clear that many of the factors listed in *Johnson* would usually be "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.* at 434 n.9, 103 S.Ct. 1933 (citation omitted).

The Court further refined its views on the appropriate method for determining a reasonable fee award in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), again affirming its preference for the lodestar method. See id. at 888, 104 S.Ct. 1541. Consistent with previous rulings, Blum explained that the proper first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." Ltd. But the Court went a step further, emphasizing that this base calculation is not an initial approximation of the final award to be made but is instead a presumed reasonable fee if the applicant "has carried his burden of showing that the claimed rate and number of hours are reasonable." Id. at 897, 104 S.Ct. 1541. The Blum Court also restricted the adjusting factors courts could use to increase or decrease the base lodestar amount. See id. at 898-900, 104 S.Ct. 1541. That is, after affirming Hensley's position that many of the Johnson factors "are subsumed within the initial calculation" of the lodestar, the Court specifically held in Blum that the "novelty and complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation generally cannot serve as independent bases for increasing the base fee award because those considerations are fully reflected in the lodestar amount. Id. Upward adjustments of the lodestar figure, although still permissible, are proper only in certain "rare" and "exceptional" cases, supported by both detailed findings by the lower courts and specific evidence on the record. See *id.* at 898–901, 104 S.Ct. 1541. And in a later ruling, the Court clarified that contingent fee arrangements also should

not enhance the base lodestar:

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the [base] lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. Taking account of it again through lodestar enhancement amounts to double counting.

The first factor (relative merits of the claim) is not reflected in the [base] lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that *always* exists (no claim has a 100% chance of success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases.

*Burlington v. Dague*, 505 U.S. 557, 562–63, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (citations omitted).

In its most current form, the lodestar method as described in *Blum* has achieved dominance in the federal courts and has "become the guiding light" for fee-shifting jurisprudence. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 801, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002) (quoting *Burlington*, 505 U.S. at 562, 112 S.Ct. 2638). As recently as 2010, the Court again outlined the value of the lodestar calculation. *See Perdue*, 559 U.S. at 551–57, 130 S.Ct. 1662. The Court explained:

\*16 Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to "the prevailing market rates in the relevant community." Developed after the practice of hourly billing had become widespread, the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. Second, the lodestar method is readily administrable; and unlike the \*\*Johnson\* approach, the lodestar calculation is "objective" and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

Id. at 551–52, 130 S.Ct. 1662 (citations omitted). The Court went on to observe that the presumptive reasonableness of the base lodestar calculation accounts for most of the

**Johnson** factors:

[W]e have noted that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate."

Id. at 553, 130 S.Ct. 1662 (citations omitted) (second and third alteration in original). This remains the standard for attorney's fee awards in federal courts today.

# b. Arthur Andersen Factors and Lodestar in Texas Courts

Similar to the federal system, Texas jurisprudence first developed a factor-based method for the fact finder to assess what fees are reasonable and necessary, the cornerstone for shifting attorney's fees away from the prevailing party. *See Arthur Andersen*, 945 S.W.2d at 818. Like the Fifth Circuit in *Johnson*, this Court identified non-exclusive factors to guide the fact finder in determining the reasonableness and

necessity of attorney's fees. See id. Those factors are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9)). We explained that without evidence of the factors identified in Disciplinary Rule 1.04, the fact finder has no meaningful way to determine if the fees sought are in fact reasonable and necessary. Id. at 818–19. The factors were designed to be applicable across all fee-shifting awards, whether determined by the jury or trial court. See Young v. Qualls, 223 S.W.3d 312, 314 (Tex. 2007) (per curiam).

In 2012, we provided additional guidelines for determining reasonableness and necessity by introducing the lodestar calculation to Texas jurisprudence. See El Apple, 370 S.W.3d at 760 (analyzing a fee award under the Texas Commission on Human Rights Act (TCHRA)); see also TEX. LAB. CODE § 21.259(a) ("In a proceeding under [the TCHRA], a court may allow the prevailing party ... a reasonable attorney's fee as part of the costs."). We explained that:

\*17 Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. The court may then adjust the base lodestar

up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

El Apple, 370 S.W.3d at 760 (citations omitted). The relevant factors are straight from Arthur Andersen. Id. at 760–61.

We ultimately overturned the fee award in *El Apple* even though the trial court employed the lodestar method, concluding that the evidence was legally insufficient to support the reasonableness and necessity of the fee award.

Id. at 763–64. The plaintiff's attorneys testified that they collectively spent 890 hours on the case (as estimated), and that those hours were attributed to "the number of discovery instruments and pleadings, the number of depositions and witness interviews, as well as the quality of representation."

Id. at 759. They also testified that their time was reasonable and necessary given the results obtained and nature of the case. Id. But that was not enough. See id. at 762–63. The starting point for determining a lodestar fee award, we noted, is the number of hours "reasonably expended on the litigation," and proof of reasonable hours "should include the basic facts underlying the lodestar, which are: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked." Id. Applying that standard to the case, we held that the evidence was insufficient because:

[N]either attorney indicated how the 890 hours they spent in the aggregate were devoted to any particular task or category of tasks. Neither attorney presented time records or other documentary evidence. Nor did they testify based on their recollection of such records. The attorneys instead based their time estimates on generalities such as the amount of discovery in the case, the number of pleadings filed, the number of witnesses questioned, and the length of the trial. While all this is relevant,

it provides none of the specificity needed for the trial court to make a meaningful lodestar determination. The court could not discern from the evidence how many hours each of the tasks required and whether that time was reasonable. Without at least some indication of the time spent on various parts of the case, a court has little basis upon which to conduct a meaningful review of the fee award.

*Id.* at 763.

After *El Apple*, questions surfaced regarding whether the lodestar method applies in cases where the request for attorney's fees is not based on the TCHRA or other state statutes that require application of the lodestar method. But any doubt as to the lodestar method's applicability should have been resolved when we applied *El Apple*'s holding to a \$ 339,000 award under a different fee-shifting statute that did not "require that attorney's fees be determined under a lodestar method." City of Laredo v. Montano, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam); see also TEX. PROP. CODE § 21.019(c) (allowing courts to award reasonable and necessary attorney's fees incurred by a property owner successfully defending a condemnation suit). Although we did not explain why, the opinion made clear that we viewed the lodestar method as having an expansive application to be used when evidence of reasonable hours worked multiplied by reasonable hourly rates can provide an objective analytical framework that is presumptively reasonable. See Montano, 414 S.W.3d at 736. Moreover, we gave additional guidance for sufficient proof when we determined that, like the proof in *El Apple*, the plaintiff's testimony in *Montano* was devoid of substance and could not support an award of reasonable attorney's fees. See id. We overturned the fee award, explaining that time estimates based on generalities were not sufficient to support a feeshifting award:

\*18 Gonzalez offered nothing to document his time in the case other than the "thousands and thousands and thousands of pages" generated during his representation of the Montanos and his belief that he had reasonably spent

1,356 hours preparing and trying the case. We rejected similar proof in *El Apple*.

Gonzalez's testimony that he spent "a lot of time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises "many, many, many, many times," and spent "countless" hours on motions and depositions is not evidence of a reasonable attorney's fee under lodestar....

In *El Apple*, we said that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work.

*Id.* (citations omitted).

A year after that, we again confirmed our position that the lodestar method applies when the fee claimant puts on evidence of reasonable fees by relating the hours worked multiplied by hourly rates for a total fee. Long, 442 S.W.3d at 255. We overturned the fee award in Long, just as we had in El Apple and Montano:

Here, as in El Apple Montano, the affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court [of] the time spent on specific tasks.... [W]ithout any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request.

*Id.* (citations omitted).

[29] Based on our recent precedent, it should have been clear that the lodestar method developed as a "short hand version" of the \*\*Arthur Andersen factors and was never intended to be a separate test or method. See Stewart Title. 822 S.W.2d at 10 ("Although courts should consider several factors when awarding attorney's fees, a short hand version of these considerations is that the trial court may award those fees that are 'reasonable and necessary' for the prosecution of the suit."); see also Hill v. Shamoun & Norman, LLP, 544 S.W.3d 724, 744 (Tex. 2018) (remanding for a new trial to determine attorney's fees and referencing Arthur Andersen factors but citing Bloyed, 916 S.W.2d at 961, for the proposition that on remand, "any fee awarded ... should be tested against the lodestar approach to prevent grossly excessive attorney's fee awards"). As we have explained, if the non-prevailing party is subject to paying the prevailing party's attorney's fees, the fees must be reasonable and necessary for success in prosecuting or defending the claim, and the award is intended to compensate the prevailing party generally for its legal representation. The lodestar method provides for this, as it is a focused and objective analysis of whether the fees sought are reasonable and necessary, yielding a base figure that reflects most Arthur Andersen factors and is thus presumptively reasonable. But that figure is subject to adjustment if the presumption is overcome by other factors not accounted for in the base lodestar figure.

\*19 [30] Incidentally, as the court of appeals did in this case, some courts have decided that testimony about an attorney's experience, the total amount of fees, and the reasonableness of the fees complies sufficiently with \*\*Arthur Andersen\*\* to support an attorney's fee award. \*See, e.g., \*\*559 S.W.3d at 168; \*\*Jeff Kaiser, PC v. State, No. 03-15-00019-CV, 2016 WL 1639731, at \*5 (Tex. App.—Austin Apr. 20, 2016, pet. denied) (mem. op.); \*\*Jimoh v. Nwogo, No. 01-13-00675-CV, 2014 WL 7335158, at \*7 (Tex. App.—Houston [1st Dist.] Dec. 23, 2014, no pet.) (mem. op.); \*\*Ferrant v. Graham Assocs. Inc., No. 02-12-00190-CV, 2014 WL 1875825, at \*9 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.); \*\*Metroplex Mailing Servs., 410 S.W.3d at 900. We have clearly held, however, that

generalities such as these are not sufficient to support a fee-shifting award under the lodestar method, which applies in fee-shifting situations. *See Long*, 442 S.W.3d at 255; *Montano*, 414 S.W.3d at 736; *El Apple*, 370 S.W.3d at 763.

Additionally, some courts of appeals have relied on our decision in Garcia, in which we stated that an attorney's testimony about his experience and his estimate of a reasonable and necessary fee in a case was "some evidence of a reasonable fee." 319 S.W.3d at 642; see, e.g., Barnett v. Schiro, No. 05-16-00999-CV, 2018 WL 329772, at \*10 (Tex. App.—Dallas Jan. 9, 2018, pet. filed) (mem. op.) (citing Garcia to say that an "attorney's brief testimony about experience, total amount of fees, and that [the] total amount of fees was reasonable and necessary is 'some evidence' of reasonableness of attorney's fees"). But as we explained in El Apple, Garcia involved a statute that required a trial court to dismiss a healthcare liability claim and award attorney's fees if the plaintiff did not timely serve an expert report. See El Apple, 370 S.W.3d at 762 (citing Garcia, 319 S.W.3d at 641); see also TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1) (mandating that if, "as to a defendant physician or health care provider, an expert report has not been served within [120 days], the court ... shall ... enter an order that: (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred"). The report was not provided in Garcia, but the trial court did not award attorney's fees as required by the statute after the fee claimant testified briefly to his experience and his customary fee for handling a case up to the point of dismissal. See Garcia, 319 S.W.3d at 640-41. The court of appeals in Garcia affirmed, concluding that the attorney's testimony was conclusory and therefore no evidence of the reasonable attorney's fees incurred by Dr. Garcia. Garcia v. Gomez, 286 S.W.3d 445, 449 (Tex. App.—Corpus Christi-Edinburg 2008), aff'd in part, rev'd in part, 319 S.W.3d 638 (Tex. 2010). However, "[w]e concluded that the statute mandated the award of attorney's fees, on motion, and that the attorney's uncontested, albeit cursory, testimony about his fee, along with the other circumstances, was enough to present the issue to the court." El Apple, 370 S.W.3d at 762 (emphasis added) (citing Garcia, 319 S.W.3d at 641).

But what we *did not say* was that such cursory testimony was sufficient to support an award of attorney's fees. \*\*Garcia\* is confined to a no-evidence challenge and should not be read, in any way, as a guiding statement on the standard for whether evidence is legally sufficient to support a fee-shifting award of attorney's fees.

\*20 Related to *Garcia* is our decision in *Kinsel v. Lindsey*, which likewise deals with the evidence to defeat a no-evidence challenge. We held:

To support its claim for attorney's fees, counsel for the Kinsels testified regarding legal services rendered and various work performed through trial, each attorney's related experience, and what factors each considered to determine a reasonable fee. Although the court of appeals found this testimony "lacking in specifics," it was "at the very least, the quantum of evidence found sufficient" by this Court in \*\*Garcia v. Gomez\*, 319 S.W.3d 638 (Tex. 2010). We agree.

526 S.W.3d at 427 (citation omitted). Because the claimant had not segregated legal fees accrued among the one recoverable and two non-recoverable claims, the court of appeals remanded the case to the trial court for a new trial on attorney's fees. See Jackson Walker, LLP v. Kinsel, 518 S.W.3d 1, 25–28 (Tex. App.—Amarillo 2015), aff'd and remanded sub nom. Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017). Having determined that the claimant presented some evidence of fees incurred on the recoverable claim, we affirmed the remand for a redetermination of fees. See Kinsel, 526 S.W.3d at 427–28. As in Garcia, our opinion in Kinsel addressed only the quantum of proof required to defeat a no-evidence challenge.

## c. Applicable Standard for Proving Reasonable Attorney's Fees

## (1) Base Calculation: Time x Rate = Presumptively Reasonable

[31] [32] [33] [34] It should have been clear from our opinions in *El Apple*, *Montano*, and *Long* that we intended the lodestar analysis to apply to any situation in

which an objective calculation of reasonable hours worked times a reasonable rate can be employed. We reaffirm today that the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. See El Apple, 370 S.W.3d at 760. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. See id. at 762–63. This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process. Cf. Blanchard v. Bergeron, 489 U.S. 87, 93, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (explaining that a fee-shifting statute "contemplates reasonable compensation ... for the time and effort expended by the attorney for the prevailing [party], no more and no less"). And the lodestar calculation should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case. See Perdue, 559 U.S. at 551, 130 S.Ct. 1662 (noting that "the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case" (emphasis in original)). This readily administrable and objectively reasonable calculation is the standard for calculating the reasonableness and necessity of attorney's fees in a fee-shifting situation. See id. at 551– 52, 130 S.Ct. 1662 (recognizing that the lodestar method is administrable and objective, cabins discretion of trial court judges, permits meaningful judicial review, and produces reasonably predictable results).

\*21 [35] [36] [37] It is worth repeating that because fee-shifting awards are to be reasonable and necessary for successfully prosecuting or defending against a claim, reasonableness and necessity are not dependent solely on the contractual fee arrangement between the prevailing party and its attorney. *Cf. Blanchard*, 489 U.S. at 96, 109 S.Ct. 939 (explaining that "[f]ee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims"); Del.

Valley Citizens' Council, 478 U.S. at 565, 106 S.Ct. 3088 (explaining that fee-shifting statutes are not "intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client"); see also Arthur Andersen, 945 S.W.2d at 818–19 (holding that although "[a] contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract," it is not "in and of itself reasonable for purposes of shifting that fee to the defendant"; the fact finder is still required to "decide the question of attorney's fees specifically in light of the work performed in the very case for which the fee is sought"). Therefore, the base lodestar calculation should reflect hours reasonably expended for services necessary to the litigation. See Hensley, 461 U.S. at 434, 103 S.Ct. 1933 ("Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."); El Apple, 370 S.W.3d at 762 ("Charges for duplicative, excessive, or inadequately documented work should be excluded." (citing Watkins v. Fordice, 7 F.3d 453, 457 (5th Cir. 1993))). Likewise, the base calculation should reflect a reasonable hourly rate for the attorney to prosecute or defend successfully against the claim at issue. <sup>10</sup> See Perdue, 559 U.S. at 551– 56, 130 S.Ct. 1662 (recognizing that the lodestar method "[d]eveloped after the practice of hourly billing had become widespread" and provides a rough approximation of such billing practices, but "if hourly billing becomes unusual, an alternative to the lodestar method may have to be found"); Missouri v. Jenkins, 491 U.S. 274, 283, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (stating that fee-shifting awards for attorney's fees "are to be based on market rates for the services rendered"); Blum, 465 U.S. at 895 n.11, 104 S.Ct. 1541 (recognizing that "determining an appropriate 'market rate' for the services of a lawyer is inherently difficult," as rates are based on supply and demand in a particular community, as well as on a lawyer's experience, skill, and reputation; however, a rate shown to be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation" is "normally deemed to be reasonable"). In light of our recent attorney's fees jurisprudence, we clarify today that there is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable

and necessary attorney's fees that can be shifted to the non-

prevailing party. See El Apple, 370 S.W.3d at 760; see also Perdue, 559 U.S. at 551–52, 130 S.Ct. 1662; Blum, 465 U.S. at 897, 104 S.Ct. 1541 (explaining that the base lodestar figure is presumed reasonable if the claimant "has carried his burden of showing that the claimed rate and number of hours are reasonable").

#### (2) Enhancing or Reducing Base Calculation

our willingness to apply the lodestar method to any situation in which an attorney testifies to reasonable hours multiplied by reasonable rates—as we did in Long and Montano renders El Apple's two-step process invalid. See, e.g., Mark E. Steiner, Will El Apple Today Keep Attorneys' Fees Away?, 19 J. CONSUMER & COM. L. 114, 117 (2016) (expressing that both Long and Montano "appear to apply the term 'lodestar' to any situation that involves recovering attorneys' fees on the basis of 'reasonable hours times reasonable rate.' There is no sense that lodestar is a two-step process, which is how the Court had described it in El Apple"). To the contrary, both Long and Montano analyzed the issue of whether the evidence was sufficient under our precedent dealing with the lodestar method—based on El Apple. See Long, 442 S.W.3d at 255; Montano, 414 S.W.3d at 736. Our opinions in Long and Montano referenced and followed *El Apple*, and both resulted in remand to the trial court for redetermination of attorney's fees. See Long, 442 S.W.3d at 255-56; Montano, 414 S.W.3d at 736–37. The second part of El Apple's twostep analysis—adjusting the base calculation up or down based on relevant considerations—remains very much intact. Like our federal counterpart, we recognize that the base lodestar figure accounts for most of the relevant Arthur Andersen considerations. 11 See Arthur Andersen, 945 S.W.2d at 818; cf. Perdue, 559 U.S. at 553, 130 S.Ct. 1662; Burlington, 505 U.S. at 562–63, 112 S.Ct. 2638; Blum, 465 U.S. at 898-900, 104 S.Ct. 1541. And an enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method. Cf. Perdue, 559 U.S. at 553, 130 S.Ct. 1662

(reaffirming that a lodestar enhancement may not be based on a factor that is included in the base lodestar calculation). As in the federal courts, the base lodestar calculation usually includes at least the following considerations from Arthur Andersen: "the time and labor required," "the novelty and difficulty of the questions involved," "the skill required to perform the legal service properly," "the fee customarily charged in the locality for similar legal services," "the amount involved," "the experience, reputation, and ability of the lawyer or lawyers performing the services," "whether the fee is fixed or contingent on results obtained," "the uncertainty [39] [40] [41] Some commentators have opined that of collection before the legal services have been rendered," and "results obtained." <sup>12</sup> See Arthur Andersen, 945 S.W.2d at 818; cf. Perdue, 559 U.S. at 553, 130 S.Ct. 1662 (noting that the base lodestar calculation appropriately accounts for the novelty and complexity of a case because those considerations are presumably "fully reflected in the number of billable hours recorded by counsel," and that the quality of the attorney's performance is likewise already accounted for because "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate" (quoting Blum, 465 U.S. at 898, 104 S.Ct. 1541; Del. Valley Citizens' Council, 478 U.S. at 566, 106 S.Ct. 3088)); Burlington, 505 U.S. at 562-63, 112 S.Ct. 2638 (disallowing an enhancement for contingency because it would likely duplicate in substantial part considerations already subsumed in the base lodestar calculation, as "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) ... is ordinarily reflected in the lodestar-either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so"). These considerations therefore may not be used to enhance or reduce the base calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate. If a fee claimant seeks an enhancement, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award. See Perdue, 559 U.S. at 553, 130 S.Ct. 1662 (observing that the requirement of "specific evidence" is essential "if the lodestar method is to realize one of its chief virtues, i.e., providing a calculation that is objective and capable of being reviewed on appeal"); El Apple, 370 S.W.3d at 760. Likewise, if a fee opponent seeks a reduction, it bears the burden of providing specific evidence to overcome the presumptive reasonableness of the base lodestar figure.

## d. Standard Summary

\*22 [42] as we presented it in *El Apple* applies for determining the reasonableness and necessity of attorney's fees in a feeshifting situation:

> Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the [fact finder] must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The [fact finder] then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. The [fact finder] may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

370 S.W.3d at 760 (citations omitted). Thus, the fact finder must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. Id. In a jury trial, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. Id. at 765; see also Perdue, 559 U.S. at 558-59, 130 S.Ct. 1662 (suggesting that adequate appellate review is only feasible when the fact finder makes reasonably specific findings as to each step of the fee determination). Arthur Andersen lists relevant considerations that may justify an adjustment, but as explained above, considerations already incorporated into the base calculation may not be applied to rebut the presumption that the base calculation reflects reasonable and necessary attorney's fees. See Arthur Andersen, 945

S.W.2d at 818; cf. Perdue, 559 U.S. at 553, 130 S.Ct. 1662: Burlington, 505 U.S. at 562–63, 112 S.Ct. 2638: *Blum*, 465 U.S. at 898–900, 104 S.Ct. 1541. General, [43] [44] To summarize, the lodestar method conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought. See Long, 442 S.W.3d at 255–56; *Montano*, 414 S.W.3d at 736–37; *El Apple*, 370 S.W.3d at 763-64. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. See El Apple, 370 S.W.3d at 762–63.

> [45] [47] As the United States Supreme Court [46] has observed, "[t]he lodestar method was never intended to be conclusive in all circumstances"; rather, "there is a 'strong presumption' that the [base] lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Perdue, 559 U.S. at 553– 54, 130 S.Ct. 1662. Thus, the second step of the lodestar method allows for the base lodestar figure to be adjusted up when considerations not already accounted for in the first step establish that the base lodestar figure represents an unreasonably low fee award, depriving fair compensation to the prevailing party's attorney. Likewise, the base lodestar figure can be adjusted down when it is established, based on considerations not already accounted for in the first step, to be an unreasonably high or excessive fee award, creating a windfall for the prevailing party or its attorney. <sup>13</sup>

#### e. Billing Records

\*23 [48] [49] Contemporaneous billing records are not required to prove that the requested fees are reasonable and necessary. See El Apple, 370 S.W.3d at 763; see also Montano, 414 S.W.3d at 736 (explaining that "El Apple does not hold that a lodestar fee can only be established through time records or billing statements").

Nevertheless, billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In *El Apple*, we acknowledged the value of contemporaneous records for lodestar calculations:

An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.

370 S.W.3d at 763; *see also id.* at 762 (observing that hours "not properly billed to one's client also are not properly billed to one's adversary" under a fee-shifting statute (quoting *Hensley*, 461 U.S. at 434, 103 S.Ct. 1933)). Creating the documents makes them available for production, provides a basis for testifying as to the reasonableness and necessity of the requested fees, and permits cross-examination.

[50] Importantly, however, we are not endorsing satellite

litigation as to attorney's fees. The fact finder will generally not benefit from attorneys cross-examining each other point-by-point on every billable matter. See Hensley, 461 U.S. at 437, 103 S.Ct. 1933 ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates."). Parties should use discovery and pretrial procedure to evaluate attorney's fee claims and the evidence supporting them, then present to the fact finder the evidence relevant to determining a reasonable and necessary fee as discussed in this opinion.

#### 3. Howard's Testimony

[51] Finally, we consider the evidence presented at trial supporting the award of attorney's fees. As mentioned, the trial court awarded \$ 1,025,000 in attorney's fees, including the conditional awards. Because UTSW secured the attorney's fees in the final judgment over Rohrmoos, we focus on the testimony of UTSW's attorney, Wade Howard. On direct examination, Howard testified that "all I've done for my 20 years" of legal experience is litigation. "The standard rate[] that I charge is generally around \$ 430 an hour. I know that sounds ridiculously high. I often think myself it is ridiculously high. But it is -- it pays for a lot of things," namely, the logistics of running a law firm. Howard then stated:

I have handled cases similar in nature to this.... [A] reasonable and necessary amount of hours in this case, I would think would be at around 750 to 1,000 hours. So that would put the attorney's fees at my rate somewhere in the 3 to \$ 400,000 range. Again, I know that sounds very high, but I do believe based on my experience, 20 years of experience in the legal profession, and handling these types of cases at this magnitude that [this] is really what would be a reasonable and necessary fee if this case were worked up by both sides in a reasonable and necessary fashion.

## \*24 Howard went on:

This case, for whatever reason, has not been worked up in a reasonable fashion. Now, of course, I'm going to say that I've put most of that on the other side. And I'll talk about that in a little more detail. But because of that, the fees in this case are much closer -- my fees are much closer to 800 -- over \$ 800,000. Now, I will be the first to admit, that is a ridiculous number.

Okay. They should never have gotten [that] high.

Howard explained how Rohrmoos's actions, in his view, caused the fees to reach such a high amount. He talked about the volume of document production, saying his firm had to "search literally millions of emails to find the documents that you see here in the courtroom. And we [had] to review all of those emails when we [ran] our searches to make sure that they're relevant to this case and also that they don't contain any patient information." 14

Next, Howard described having to produce large numbers of hard-copy documents. "It was about 60 bankers boxes of documents," Howard said, and "[t]hose bankers boxes will hold -- the small ones will hold around 3,000 pages, the larger ones around 7,000 pages of documents." Tasked with reviewing all those documents were the paralegals, who bill the client for their time. They "had to go through every single one of those documents, page by page, and remove all of the old patient files that we had in [those] boxes of documents.... That's one of the reasons why the costs in this case have gotten so ridiculously high."

From there, Howard went to depositions. "Okay. When somebody -- when a witness gets deposed, both sides have to prepare for the deposition. Then you have to go to the deposition. Then you have time reviewing the deposition afterwards, getting it summarized and making it ready for if it's actually called to trial." Those get expensive, "[s]o that's another thing that's contributed." Howard testified summarily that more than forty depositions occurred in this case. He then ended with an analogy aimed at shedding light on Rohrmoos's actions:

[I]t's kind of like when you go to the doctor and the doctor says, I think I need to run the following tests. You, as the patient, just kind of go, okay.... And when a lawyer has that kind of control, they can just run up the fees. They can just say, oh, I need to investigate this. I need to do research on that. I want to file a motion on that.

This all led to a lengthy discussion of motion practice. "I think [there were] four or five motions to compel" and a forty-page motion for summary judgment. Howard explained:

I can tell you from my experience, to draft a motion of that length is expensive. Probably was 30, \$40,000 to draft that type of detailed motion on the law.

\*25 I then have to respond to it. I file my response. He then filed a 30 or 35-page what they call reply to my response. Then we have to have a hearing on it. Lasted for several hours. That one motion alone, probably cost the parties \$ 80,000. And in my opinion, it just wasn't necessary. It wasn't reasonable. It wasn't necessary. And it just caused both parties to spend a lot of money that wasn't necessary.

And so, you know, again, I'm sure when [opposing counsel] takes the stand, he's going to say, I've done things that have run on up the cost. The simple reality is, both parties probably have to take some blame. The costs got way out of control here and the fees were not reasonable or necessary. I think the 3 to \$ 400,000 range is where fees are reasonable and necessary. I do think, however, that if you find that we prevail in this case, that our fees should be something higher than that. I won't even wager a guess as to what it should be higher than that. Whatever you think is necessary. But I think our fees were higher than what were reasonable and necessary because we had to respond to all of the experts that [opposing counsel] designated. We had to appear at all the depositions that he noticed. I can't just ignore those things.

So, if we prevail, I think our fees should be somewhat higher [than] the 3 to \$ 400,000 range, but I'll leave that to your discretion. But I will tell you that if both sides had just approached this case in a reasonable fashion, the fees in this case should not have exceeded 3 or \$ 400,000.

That concluded Howard's direct testimony. Rohrmoos's counsel immediately moved to strike it, asserting that Howard did not comply with the \*\*Arthur Andersen\* factors to prove the reasonableness of the fees. The trial court denied the motion after Howard responded, "The amount in controversy, Your Honor, the complexity of the case, my knowledge and experience. I think that's really the factors that were relevant in this case." The court of appeals then affirmed the award, holding that "Howard's testimony concerning his experience, the total amount of fees, and the reasonableness of the fees

charged was sufficient to support the award" under Arthur Andersen. 559 S.W.3d at 168.

We understand Howard's testimony that \$ 800,000 in attorney's fees for trial work may seem unreasonable for a breach of lease case that implicated roughly \$ 300,000 in damages. 15 We also understand Howard's position that opposing counsel's actions drove the cost of litigation, in most instances, and that made UTSW's \$ 800,000 in requested attorney's fees necessary, even reasonable. 16 However true this may be, Howard's justification for why his fees should be \$ 800,000—searching through "millions" of emails and reviewing "hundreds of thousands" of papers in discovery, more than forty depositions taken, and a forty-page motion for summary judgment—is too general to establish that the requested fees were reasonable and necessary. Without detail about the work done, how much time was spent on the tasks, and how he arrived at the \$800,000 sum, Howard's testimony lacks the substance required to uphold a fee award.

See Long, 442 S.W.3d at 255–56; Montano, 414 S.W.3d at 736–37; El Apple, 370 S.W.3d at 763–64. Attorneys should not have to take the stand for days and testify to every detail of a three-year-long case, but they must provide more

than what Howard has said here. We conclude that Howard's testimony is legally insufficient to support the attorney's fee award.

#### V. Conclusion

\*26 In summary, we hold that a commercial tenant can terminate a commercial lease based on the landlord's prior material breach. Our holding is not inconsistent with

Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373 (Tex. 1988). We affirm the court of appeals' judgment as to breach of the implied warranty of suitability, but on different grounds. We also hold that the evidence used to prove attorney's fees is not legally sufficient to support the fee award. Because the record does not provide the requisite details to support a fee award, we reverse the court of appeals' judgment as to the attorney's fee award and remand the case to the trial court for a redetermination of fees consistent with this opinion.

#### **All Citations**

--- S.W.3d ----, 2019 WL 1873428, 62 Tex. Sup. Ct. J. 808

## Footnotes

- 1 Rohrmoos's and UTSW's predecessors executed the original lease in 1996. Rohrmoos and UTSW modified and ratified that original lease agreement in March 2003.
- Rohrmoos also argued that UTSW was not entitled to recover attorney's fees under the Declaratory Judgment Act because UTSW allegedly abandoned its declaratory judgment claim prior to trial. See TEX. CIV. PRAC. & REM. CODE § 37.009 (stating that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just"). The court of appeals declined to address this issue because it affirmed the award of attorney's fees on other grounds. See 559 S.W.3d at 164–65.
- We note that Rohrmoos relied heavily on *Davidow* in its briefing to the court of appeals. Although unclear at times, there are multiple instances in which Rohrmoos presented its theory that *Davidow* does not allow the remedy of termination upon a showing that the landlord materially breached the commercial lease. Rohrmoos asserted:

UTSW's claims of breach of lease from failing to make repairs should have been dealt with on their proper foundation in fact and law, the remedy being money damages. "Thus, a tenant is still under a duty to pay rent even though his

landlord has breached his covenant to make repairs." Davidow v. Inwood North Prof. Group-Phase I, 747 S.W.2d 373, 375 (Tex. 1988) (confirming that failure to make repairs does not justify rescission).

A lease property can obviously experience repair issues without causing the landlord to be in breach of the lease.

Were this not so, the implied warranty of suitability created in *Davidow* would have been completely unnecessary since the concept of "breach" (or "material breach" in Mr. Howard's world) would have already provided the identical remedy of rescission.

....

Even if Rohrmoos had failed to repair property defects (which it did not), the remedy under Texas law for a tenant in that situation is money damages.... For recompense, the tenant can sue for damages or it can make the repairs itself and deduct the cost from rent owed. What a tenant *cannot* do is claim "breach of lease" from repairs not being performed on its preferred timetable and then vacate the premises years later. If that were the law, the *slightest* unrepaired defect in the property: a burned-out light bulb, would afford the tenant with the *harshest* remedy known to the law: rescission. And, as shown above, if that were the law, there would have been no need for the warranty of unsuitability.

4 Rohrmoos argued:

Indeed, if UTSW was correct, and if a "material" breach allowed for lease termination, then the Supreme Court's decision in Davidow was totally unnecessary. After all, what is the purpose of adopting the Davidow warranty if every lease can already be "materially" breached and that alone would allow for termination/rescission? The fact is, before Davidow, a landlord's breach of a commercial lease afforded the tenant with only limited recourse—which did not include termination or refusal to pay rent. For UTSW to continue to argue that "material breach" allows for termination is contrary to over 100 years of Texas law and renders the Davidow factors irrelevant.

5 See discussion infra Part III.

- 6 Rohrmoos asserts many arguments in an attempt to negate the jury's finding that Rohrmoos breached the Davidow implied warranty of suitability, including: (1) no competent evidence supports the finding that the Davidow implied warranty was breached; (2) UTSW waived its Davidow warranty claims because it remained on the property and continued to use the facility; (3) the parties agreed to an express warranty in the lease under Article 13 that superseded Davidow and therefore made Davidow's implied warranty inapplicable as a matter of law; and (4) there is an "as is" clause in the lease that renders Davidow's implied warranty inapplicable as a matter of law. None of these arguments are helpful to Rohrmoos, however, unless it also defeats the jury's finding that it materially breached the commercial lease. 7 To support its position, UTSW relies heavily on case law from courts of appeals that developed after our decision in El Apple I, Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012), for the proposition that testimony regarding the total amount of fees, the reasonableness of the fees, the number of hours worked, the average hourly rate, the nature of the case, and the attorney's experience is sufficient to support a fee award under Arthur Andersen. See, e.g., Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co., 410 S.W.3d 889, 900 (Tex. App. - Dallas 2013, no pet.) ("It has consistently been held that an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award." (citing In re A.B.P., 291 S.W.3d 91, 99 (Tex. App. - Dallas 2009, no pet.))); Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP, 422 S.W.3d 821, 846 (Tex. App. - Dallas 2014, no pet.) (citing *Metroplex* for the same proposition).
- The United States Supreme Court takes a different view regarding attorney pro se representation, at least under the Civil Rights Attorney's Fees Award Act of 1976. See generally Kay v. Ehrler, 499 U.S. 432, 435–36, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991) (denying attorney's fees to a pro se attorney because "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988" of the Act (footnotes omitted)).
- We note that section 38.004 of the Civil Practice and Remedies Code authorizes a court, in certain proceedings involving fee-shifting under section 38.001, to take judicial notice of usual and customary attorney's fees. TEX. CIV. PRAC. & REM. CODE § 38.004 ("The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: (1) a proceeding before the court; or (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement."). In such instances, there is a rebuttable presumption that the usual and customary fees are reasonable. *Id.* § 38.003 ("It is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable.").
- 10 We recognize that when fee agreements provide for arrangements other than hourly billing, the attorney will not be able to present evidence of a particular hourly rate billed or paid for the services performed. In those instances, the fee claimant, through its expert, has the burden of showing that the rate claimed for purposes of the base lodestar calculation reflects

a reasonable market rate given considerations in Arthur Andersen, including the attorney's experience and expertise, the novelty and complexity of the questions involved, any special skill required for the representation, the attorney's risk in accepting such representation, which may be reflected in a contingent fee agreement, and any other considerations

that would factor into an attorney's fee negotiations if the attorney were to bill hourly. See Burlington, 505 U.S. at

566, 112 S.Ct. 2638 (noting that "attorneys factor in the particular risks of a case in negotiating their fee"); — Del. Valley Citizens' Council, 478 U.S. at 566, 106 S.Ct. 3088 (recognizing that "considerations concerning the quality of a prevailing

party's counsel's representation normally are reflected in the reasonable hourly rate"); Arthur Andersen, 945 S.W.2d at 818–19 (explaining that for contingent fee cases, the jury must decide reasonable and necessary fees in light of the work performed in that case, and reflecting the non-exclusive list of factors, arriving at a specific dollar amount). In this way, the contingent nature of a fee agreement, or the nature of an alternative fee arrangement, is taken into account in calculating the presumptively reasonable fee in the first step of the analysis, prior to any potential adjustments for

Arthur Andersen factors that have not yet been considered, as discussed below. See infra Part IV.B.2.c.(2).

- Although Arthur Andersen speaks in terms of factors, we employ the term "considerations" because there are multiple considerations within some of the factors.
- Because attorney's fee determinations in federal court are within the district court's discretion, the "results obtained" factor is generally considered in calculating the base lodestar, and thus "it normally should not provide an independent

basis for increasing the fee award." Blum, 465 U.S. at 900, 104 S.Ct. 1541; see also Perdue, 559 U.S. at 554, 130 S.Ct. 1662 (considering "results obtained" in conjunction with superior attorney performance and indicating that in rare and exceptional circumstances where specific evidence demonstrates that the base lodestar fee would not have been

"adequate to attract competent counsel," superior attorney performance may justify an enhancement (quoting Blum, 465 U.S. at 897, 104 S.Ct. 1541)). In Texas courts, the base lodestar calculation of reasonable hours times a reasonable rate should account for any results obtained up to trial. But to the extent that the results obtained are not reflected in the base lodestar, then the fact finder may determine whether the results obtained consideration necessitates an adjustment

to achieve a reasonable fee under the second step of the lodestar method. *Cf. Barker v. Eckman*, 213 S.W.3d 306, 313–14 (Tex. 2006).

- We emphasize that, pursuant to an attorney-client fee agreement, a client could ultimately owe its attorney more fees than the amount of the award shifting fees to the non-prevailing party. However, fact finders should be concerned with awarding reasonable and necessary fees, not with any contractual obligations that may remain between the attorney and client.
- On cross-examination, Howard explained that it was probably "tens of millions" of documents, rather than just "millions," but they did not have to physically review each document. Computer software designed for discovery in litigation narrowed down the final number to around "hundreds of thousands of pages of documents that we put eyes on."
- Indeed, Rohrmoos requested \$ 1,300,000 in attorney's fees. Even the trial court was baffled by the high amount of attorney's fees for a breach of lease case.

THE COURT: Okay. So, now, let's go [back] to the amount [of attorney's fees].

MR. HOWARD: Yes, Your Honor.

THE COURT: We all had those discussions both on the record and off the record of what this court's impression was of the attorney's fees and how this case was driven. I believe that defense counsel testified to how much in attorney's fees? MR. HOWARD: \$ 1.3 million, Your Honor, for the landlord. And there were --

THE COURT: And how much was -- how much rent did you owe if you had lost?

MR. HOWARD: The less than 300.

THE COURT: \$ 300,000. And the attorney's fees for defendant, once again, were how much?

MR. HOWARD: The landlord's were \$ 1.3 million.
THE COURT: And how much did -- were you yours?

MR. HOWARD: Ours were over \$800,000. THE COURT: On a breach of lease case?

MR. HOWARD: Yes, Your Honor.

THE COURT: And if you moved out and you move out too early, before the term of the lease was up, how much would you have owed had you lost, one more time?

MR. HOWARD: Less than \$300,000.

THE COURT: Think about it. Thank you. All right. You can continue.

16 Howard explained himself to the court:

Which is exactly why, Your Honor, that what I testified to was that the reasonable necessary fees in this case should have been in the 3 to \$ 400,000. But primarily because of the Defendant's conduct, hiring twelve experts –

...

[The Defendants] spent \$ 1.3 million [in attorney's fees]. Of course, I'm -- you know, he notices up 37 depositions including, you know, 15 third-party depositions, I have to attend. He hires twelve experts. You know, I have to depose them and know what they're going to say. And all of that evidence came in about all the things that the landlord did that caused the Plaintiff to incur significantly more fees than what should have been reasonable and necessary. But if you recall, I did say that we did have to do those. They were reasonable. They were necessary. The amount charged was reasonable. The time spent doing those tasks was reasonable. It just -- the actions they took.

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Declined to Extend by Reyes v. Guandique, Tex.App.-Hous. (14 Dist.),
August 23, 2018

251 S.W.3d 31 Supreme Court of Texas.

# TEXAS MUTUAL INSURANCE COMPANY, Petitioner,

v.

Paula LEDBETTER, Representative of the Estate of Charles Wade Ledbetter, Individually and as Next Friend of Dustin Wade Ledbetter, a Minor, and Tonja Ledbetter and Jamie Ledbetter, Individually, Respondents.

> No. 06–0814. | Argued Nov. 15, 2007. | Opinion Delivered April 4, 2008.

## **Synopsis**

**Background:** Workers' compensation carrier petitioned to intervene in tort suit to recover for electrocution in course and scope of employment. The 259th District Court, Jones County, Brooks Hagler, J., approved settlement between worker's widow and alleged tortfeasors and granted widow's motion to strike carrier's petition. Carrier appealed. The

Eastland Court of Appeals, Rick Strange, J., 192 S.W.3d 912, reversed and remanded. Review was granted.

Holdings: The Supreme Court, Brister, J., held that:

- [1] District Court deprived carrier of statutory right to first money;
- [2] carrier was entitled to intervene;
- [3] it was not required to plead the precise amount of reimbursement sought; and
- [4] surviving spouse and children were not entitled to dismissal from case after settlement of tort claim.

Affirmed in part, reversed in part, and remanded.

Johnson, J., concurred in part.

Procedural Posture(s): On Appeal.

West Headnotes (17)

## [1] Workers' Compensation

- Rights of Employer or Insurer

Denial of workers' compensation insurer's subrogation claim and distribution of tort settlement to worker's estate, attorneys, and ad litem deprived carrier of statutory right to first money, even though carrier could sue alleged tortfeasors; such a suit would give the carrier second or third money, not first money. V.T.C.A., Labor Code § 417.002.

11 Cases that cite this headnote

## [2] Workers' Compensation

- Rights of Employer or Insurer

The compensation carrier gets the first money a worker receives from a tortfeasor. V.T.C.A., Labor Code § 417.002.

12 Cases that cite this headnote

## [3] Workers' Compensation

Rights of employee or dependent

#### **Workers' Compensation**

Rights of Employer or Insurer

Until a workers' compensation carrier is reimbursed in full, the employee or his representatives have no right to any of funds from recovery in tort suit. V.T.C.A., Labor Code § 417.002.

15 Cases that cite this headnote

## [4] Parties

Fime for intervention

Generally, one cannot intervene after final judgment.

16 Cases that cite this headnote

## [5] Appeal and Error

Intervention or addition of new parties

#### **Parties**

## Time for intervention

When a subrogee's interest has been adequately represented and then suddenly abandoned by someone else, the subrogee can intervene even after judgment or on appeal so long as there is neither unnecessary delay nor prejudice to the existing parties.

6 Cases that cite this headnote

## [6] Workers' Compensation

New parties, intervention, and substitution

Workers' compensation carrier was entitled to intervene to assert subrogation claim after settlement of tort suit; carrier had no reason to intervene until nonsuit of its claim was filed, and intervention did not cause any delay or prejudice, as the underlying case had already settled.

5 Cases that cite this headnote

## [7] Workers' Compensation

Declaration, complaint, or petition

Workers' compensation insurer seeking subrogation after settlement of worker's tort claim was not required to plead the precise amount of reimbursement sought; carrier's petition needed to give fair notice of claim, not the specific dollar amount sought.

3 Cases that cite this headnote

## [8] Workers' Compensation

Plea or answer

Rule requiring defendant to file with his plea an account stating distinctly the nature of payment and the several items of it governed payment as an affirmative defense, not an affirmative claim, and, therefore, did not apply to subrogation claim by workers' compensation carrier after settlement of workers' tort claim. Vernon's Ann.Texas Rules Civ.Proc., Rule 95.

#### 1 Cases that cite this headnote

## [9] Workers' Compensation

Subrogation of or assignment to insurer

Special requirements for sworn accounts did not apply to subrogation claim by workers' compensation carrier after settlement of workers' tort claim, as the carrier had no account with the tortfeasors. Vernon's Ann. Texas Rules Civ. Proc., Rule 185.

4 Cases that cite this headnote

## [10] Workers' Compensation

New parties, intervention, and substitution

Workers' compensation insurer seeking subrogation after settlement of worker's tort claim was not required to prove up its whole case the day it intervened.

1 Cases that cite this headnote

## [11] Workers' Compensation

Actions and Proceedings

Worker's surviving spouse and children were not entitled to dismissal from case after settlement of tort claim, but before reimbursement of workers' compensation carrier, even though they were entitled to nonsuit of their claims; dismissal would prejudice carrier's claim to first money from settlement funds and claim for declaratory judgment regarding duty to make future payments. V.T.C.A., Labor Code § 417.002; Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

3 Cases that cite this headnote

## [12] Pretrial Procedure

Right in general

Parties have an absolute right to nonsuit their own claims, but not someone else's claims they are trying to avoid. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

5 Cases that cite this headnote

#### [13] Pretrial Procedure

Counterclaim or other request for affirmative relief, effect of

A "claim for affirmative relief" within the meaning of rule prohibiting dismissal prejudicing right of an adverse party to be heard on a pending claim for affirmative relief is one on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of action. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

9 Cases that cite this headnote

## [14] Workers' Compensation

Actions and Proceedings

A workers' compensation carrier's subrogation claim is a "claim for affirmative relief" within the meaning of rule prohibiting dismissal prejudicing right of an adverse party to be heard on a pending claim for affirmative relief; the claim can be prosecuted by a carrier even if an injured worker never does. V.T.C.A., Labor Code § 417.001(b); Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

6 Cases that cite this headnote

## [15] Pretrial Procedure

Counterclaim or other request for affirmative relief, effect of

Rule prohibiting dismissal prejudicing right of an adverse party to be heard on a pending claim for affirmative relief is not limited to affirmative claims against the nonsuiter; it prohibits dismissal if the effect would be to prejudice any pending claim for affirmative relief. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

10 Cases that cite this headnote

## [16] Infants

Appearance and Representation by Counsel

Plaintiffs' attorney was not entitled to seek nonsuit of minor's claims after appointment of attorney ad litem.

#### 1 Cases that cite this headnote

## [17] Workers' Compensation

- Rights of Employer or Insurer

When an injured worker settles a case without reimbursing a workers' compensation carrier, everyone involved is liable to the carrier for conversion, i.e., the plaintiffs, the plaintiffs' attorney, and the defendants. V.T.C.A., Labor Code § 417.002.

3 Cases that cite this headnote

#### **Attorneys and Law Firms**

\*33 Blake Bradford Thompson, The Thompson Law Office, Stephenville, Michael L. Byrd, Byrd & Associates, Lubbock, Mary Barrow Nichols, Jackie M. Kenyon, Texas Mutual Insurance Company, Mary A. Keeney, Graves Dougherty Hearon & Moody, P.C., Austin, TX, for Petitioner.

David C. Hall, Lance Hall, Sweetwater, Burt L. Burnett, Burnett & Burke, L.L.P., Abilene, for Respondents.

R. Bruce Moon, Brian J. Brandstetter, Brackett & Ellis, P.C., Fort Worth, TX, for Randy Nelms.

Joshua T. Kutchin, Robert H. Fugate, Fanning, Harper & Martinson, P.C., Dallas, TX, for Williams Scotsman, Inc.

William Lowe Burke III, Burnett & Burke, L.L.P., Abilene, TX, for D.L., Minor.

#### **Opinion**

Justice BRISTER delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice HECHT, Justice O'NEILL, Justice WAINWRIGHT, Justice MEDINA, Justice GREEN, and Justice WILLETT joined, and in which Justice JOHNSON joined as to Parts I through III and Part V.

[1] For decades, Texas law has required the first money recovered by an injured worker from a tortfeasor to go to the worker's compensation carrier, and until the carrier "is paid in full the employee or his representatives have no right to any funds." In this case, a \$4.5 million settlement was structured so the plaintiffs and their attorney got all the funds and the compensation carrier got nothing. The plaintiffs argue this

result is harmless because the carrier can sue the defendants (they do not volunteer themselves) to get the money back. That might give the carrier second or third money, but not first money. As the statute guarantees the carrier first money, we reverse.

#### I. Background

Charles Ledbetter was electrocuted in August of 2003 while working on a job for his employer. His worker's compensation \*34 carrier, Texas Mutual Insurance Company, paid \$6,000 in funeral expenses and began paying \$1,258 monthly death benefits to his widow and minor son.

His widow (individually, as administrator of his estate, and as next friend of his minor son) and two adult daughters filed suit in January 2004 against third parties alleged to be responsible for his death. <sup>2</sup> The case settled for \$4.5 million in November 2004, two weeks before the trial setting. As the settlement involved a minor, the trial court had to approve it. <sup>3</sup> Notice of the settlement was sent to Texas Mutual on December 1, 2004, along with notice of the hearing set on December 14th.

Before the hearing began, Texas Mutual filed a petition in intervention seeking subrogation for past and future benefit payments. At the start of the hearing (indeed before the trial judge was able to call the case), the plaintiffs' attorney nonsuited all claims except those of Ledbetter's estate. The trial court granted the nonsuit over the carrier's objection that doing so would subvert its subrogation rights.

The plaintiffs then announced that the \$4.5 million settlement would be allocated \$2,388,545.40 to Ledbetter's estate (for pain and suffering before his death), \$2,063,912.60 to their attorney, \$47,542.00 to the ad litem, and nothing to the widow, the minor child, the adult daughters, or the compensation carrier. Ledbetter died intestate, so his widow was entitled to one-third of the estate and his children to the remainder. <sup>4</sup> But there was no evidence regarding expenses or expected distributions from Ledbetter's estate, or any testimony regarding how this settlement benefitted the minor. To the contrary, the only reasons the ad litem stated for approving the settlement were (1) the minor would get nothing until he was 18 or older, and (2) his mother "understands her obligation to her child" in the meantime. Nor did the plaintiffs' attorney explain how the minor was

to be protected, instead focusing his questions on protecting himself. <sup>5</sup>

The carrier's attorney attempted to ascertain what the estate would do with its money and whether the Ledbetters had any other income, but the plaintiffs' attorney objected and the trial court sustained those objections. The carrier also tried to prove up its right to subrogation, but the trial court again sustained the plaintiffs' attorney's objection that "[f]or him to show up today and file his petition and think he needs to start calling lawyers and everybody else as witnesses to prove their subrogation interest, if they have one, is ridiculous."

At the end of the short hearing, the trial court approved the settlement—even though the nonsuit and dismissal purportedly meant it no longer involved a minor. The final judgment ordered five insurers to pay annuities to six different persons or entities, none of whom were Ledbetter's family members; <sup>6</sup> in an attachment, Ledbetter's widow "acknowledged" that she would direct payment from some of those \*35 annuities to family members, but the attachment also contained a provision allowing her to "change the payment directions" within 30 days of the judgment. The trial court also struck the carrier's intervention but ordered it to remain a party (though it is unclear to what), and ordered the carrier to keep paying Ledbetter's widow and son future benefits.

The court of appeals held the trial court erred in striking the carrier's intervention, <sup>7</sup> and in allocating 100 percent of the settlement to the estate, citing the limited evidence that Charles suffered pain before his death and the undisputed evidence that his widow and son suffered the loss of their sole means of support. <sup>8</sup> But the court of appeals declined to set aside the trial court's nonsuit and reinstate Ledbetter's wife and son as parties. <sup>9</sup> Both sides appeal, the plaintiffs arguing the court of appeals went too far, and the carrier arguing it did not go far enough.

## II. The Carrier's Right to First Money

[2] The law governing this settlement is simple: the compensation carrier gets the first money a worker receives from a tortfeasor. <sup>10</sup> First-money reimbursement is crucial to the worker's compensation system because it reduces costs

for carriers (and thus employers, and thus the public) and prevents double recovery by workers. 11

If an employee is killed in the course and scope of employment, the compensation carrier must pay benefits to the worker's legal beneficiaries (usually a spouse or minor children). <sup>12</sup> If the death was caused by a third party, the beneficiaries may bring wrongful death and survival claims, <sup>13</sup> and a carrier who pays benefits may do the same in the name of the beneficiaries or the employee. <sup>14</sup> If there is a recovery, "rather than the employee owning the money and being forced to disgorge it, the carrier is first entitled to the money up to the total amount of benefits it has paid," <sup>15</sup> according to the following statutory plan:

- any net recovery up to the amount of past benefits goes to the carrier; <sup>16</sup>
- any recovery greater than past benefits but less than all future benefits \*36 goes to the beneficiary, but releases the carrier from future payments to that extent; <sup>17</sup>
- any recovery greater than past and future benefits combined goes to the beneficiary.
- [3] There is nothing discretionary about this statute; a carrier's right to reimbursement is mandatory. In the words of the statute:

The net amount recovered by a claimant in a third-party action *shall be used* to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury. <sup>19</sup>

Thus, until a carrier is reimbursed in full, "the employee or his representatives have no right to any of such funds." <sup>20</sup>

Obviously, the carrier did not get the first money when the trial court denied its subrogation claim and distributed the entire settlement to the Ledbetter estate, the plaintiffs' attorney, and the ad litem. The court of appeals correctly held the trial court abused its discretion in doing so.

## III. The Carrier's Right to Intervene

The court of appeals was also correct that the trial court erred in striking the carrier's intervention.

- [4] [5] There is no deadline for intervention in the Texas Rules of Civil Procedure. <sup>21</sup> Generally one cannot intervene after final judgment. <sup>22</sup> But when a subrogee's interest has been adequately represented and then suddenly abandoned by someone else, it can intervene even after judgment or on appeal so long as there is neither unnecessary delay nor prejudice to the existing parties. <sup>23</sup>
- [6] Here, the carrier had no reason to intervene earlier, as its claim and the plaintiffs' were identical insofar as recovering from any tortfeasors. The compensation statute explicitly allows attorneys to represent workers and their carriers simultaneously, and to collect fees out of the carriers' subrogation claims. <sup>24</sup> The draft judgment the plaintiffs filed with the trial court included a paragraph granting the carrier subrogation after deducting one-third as an attorney's fee. Not until the plaintiffs nonsuited and asked the trial court to award the carrier nothing did it have any reason to intervene to protect its claim.

Nor did the carrier's intervention cause any delay or prejudice, as the underlying case had already settled. The intervention would not have delayed the settlement a moment had the plaintiffs honestly admitted the benefits they got and agreed to the carrier's right to first money as Texas law requires.

- \*37 [7] In their response and cross-petition, the plaintiffs have dropped their claim that the carrier's intervention was filed too late, now conceding it had no legal duty to intervene any earlier. Instead, they argue subrogation should be denied because the carrier neither pleaded nor proved the exact amount of benefits it paid.
- [8] [9] There is no requirement that a carrier plead the precise amount of reimbursement it seeks. Such a requirement would often be impractical, requiring an amended petition every week as more benefits are paid. Oddly, the plaintiffs claim Rule 95 imposes such a requirement, but that rule governs payment as an affirmative *defense*, not payment as an affirmative *claim*. <sup>25</sup> Nor was the carrier's petition governed by the special requirements for sworn accounts, <sup>26</sup> as the

carrier had no account with the tortfeasors. All the carrier's petition had to do was give fair notice of that claim, <sup>27</sup> not the specific dollar amount sought.

[10] Nor was the carrier required to prove up its whole case the day it intervened. The intervention here was timely (as noted above), and litigants cannot be put to trial summarily. <sup>28</sup> The plaintiffs point out correctly that a carrier must prove its case at trial, <sup>29</sup> but this case was called for a settlement hearing, not trial. Although the trial court's findings of fact state that the parties waived a jury and elected to proceed with trial, the judgment itself and the transcript of the hearing (entitled "Settlement Hearing") show that is simply not the case. Moreover, at the hearing Ledbetter's widow admitted receiving \$1,258 a month in benefits since her husband's death, so the trial court had no basis whatsoever for denying subrogation completely.

A carrier's subrogation claim should hardly ever be contested; claimants should already know how much they have received in benefits, and a carrier is entitled to reimbursement for medical payments without proof that they were reasonable and necessary. <sup>30</sup> But assuming the Ledbetters wanted to contest those amounts, they could not insist on a summary trial or on being dismissed at the same time, a matter to which we now turn.

#### IV. The Plaintiffs' Right to Nonsuit

[11] [12] The plaintiffs argue the trial court had no choice but to grant their nonsuit and dismiss them from the case. <sup>31</sup> The first point is correct but the second is not. Parties have an absolute right to nonsuit *their own* claims, <sup>32</sup> but not *someone else's* claims they are trying to avoid.

\*38 [13] [14] [15] Rule 162 governing nonsurprovides that "[a]ny dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." <sup>33</sup> A claim for affirmative relief is one "on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of action." <sup>34</sup> A carrier's subrogation claim is just such a claim, as it can be prosecuted by a carrier even if an injured worker never does. <sup>35</sup> It is true the carrier here sought no affirmative relief *from the plaintiffs*, seeking instead reimbursement from the funds the defendants were about to

pay them. But Rule 162 is not limited to affirmative claims *against the nonsuiter*; it prohibits dismissal if the effect would be to prejudice any pending claim for affirmative relief, period.

As a matter of law, the dismissal here prejudiced the carrier's pending claim for affirmative relief. By statute, a carrier is entitled to first money, and that right is gone forever if the money goes first to someone else. Additionally, the carrier sought a declaratory judgment regarding its duty to make payments to the widow and son in the future, <sup>36</sup> a matter that cannot be decided in their absence. <sup>37</sup> While the plaintiffs were entitled to nonsuit their own affirmative claims, they were not entitled to dismissal from the case.

[16] As the plaintiffs therefore must be reinstated as parties, one more matter requires mention. Perhaps even more troubling than what happened to the carrier in this case is what happened to the minor. The plaintiffs' attorney nonsuited the minor's claims, but that was not his motion to make after an attorney ad litem had been appointed. The only reason judges appoint ad litems and approve minor settlements is because a minor's interests may conflict with those of other family members or their attorneys. The record here makes no mention of recovery for the minor; it is possible this was disclosed and discussed off the record, but of course the primary reason for holding settlement hearings is to create such a record. On this record, one simply cannot tell whether the trial court or the ad litem discharged their duties to make sure this minor was protected. On remand, the trial court must ensure not only that the carrier gets first money, but that the minor's interests are protected in the resulting allocation.

## V. Disposition

Rule 162 governing nonsuits reimbursing a compensation carrier, everyone involved is pursuant to this rule shall adverse party to be heard ative relief." 33 A claim for the plaintiff abandons his [17] When an injured worker settles a case without reimbursing a compensation carrier, everyone involved is liable to the carrier for conversion—the plaintiffs, the plaintiffs' attorney, and the defendants. 38 \*39 As between those parties, we have held that generally those who received the funds unlawfully (the plaintiffs and their attorney) should disgorge them rather than making the tortfeasors pay twice. 39

No one has asked us to set aside the plaintiffs' settlement with the named defendants, and we do not hold that it is necessary. Given the limited size of the carrier's subrogation claim and the large size of the settlement, we are confident the trial court

can protect both the carrier's and the minor's interests without undoing the settlement entirely and starting the litigation from scratch.

Accordingly, we affirm the court of appeals' judgment reinstating Texas Mutual's petition in intervention for reimbursement of past and future benefits, and for attorney's fees and costs incurred in trying to collect them. We reverse the judgments of the courts below dismissing the plaintiffs from the litigation and approving distribution of funds to them without deducting that reimbursement. We remand to the trial court for further proceedings consistent with this opinion.

#### **All Citations**

251 S.W.3d 31, 51 Tex. Sup. Ct. J. 711

#### Footnotes

- Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 530 (Tex.2002) ( "For decades, the law has been that under the Workers' Compensation Act's subrogation provision the first money paid to or recovered by the employee or his representatives belongs to the compensation carrier paying the compensation, and until it is paid in full the employee or his representatives have no right to any funds.") (internal quotations and punctuation omitted) (citing Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865, 869 (1952)).
- Those parties are Randy Nelms, d/b/a Nelms Electric and Williams Scotsman, Inc. Although neither is party to this appeal, the latter has filed an amicus brief supporting Texas Mutual's petition.
- 3 See TEX.R. CIV. P. 44(2).
- 4 See TEX. PROB.CODE § 38(b)(1).
- Specifically, the Ledbetters' attorney asked his clients to admit that he had made no representations to them about the taxation or worker's compensation implications of the settlement, and to admit they were satisfied with his handling of the case.
- The judgment (which incorporated an attachment) ordered immediate payments to be made by Allstate Life Insurance Company, Metropolitan Life Insurance Company, The Travelers Insurance Company, Zurich Insurance Company, and an entity listed as "AXIS" without other appellation. It ordered payments to be made to NABCO Assignment Ltd., The Travelers Life & Annuity Company, Tower Resources Group Inc., Burt Burnett (the plaintiffs' counsel), W.L. Burke III (the ad litem), and the estate of Charles Ledbetter.
- 7 192 S.W.3d 912, 920.
- 8 Id. at 922.
- 9 Id. at 920
- Fortis Benefits v. Cantu, 234 S.W.3d 642, 649 (Tex.2007) (stating that "Texas workers' compensation law specifically embraces an insurer's first-money right of subrogation"); Daughters of Charity Health Servs. of Waco v. Linnstaedter, 226 S.W.3d 409, 412 (Tex.2007) ("If a worker obtains a tort recovery, the compensation carrier is reimbursed first...."); Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 530 (Tex.2002); Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865, 869 (1952).
- 11 Capitol Aggregates, Inc. v. Great Am. Ins. Co., 408 S.W.2d 922, 924 (Tex.1966); Haygood, 246 S.W.2d at 868.
- TEX. LAB.CODE §§ 408.181, 408.182; see also id. § 408.182(d) ("If there is no eligible spouse, no eligible child, and no eligible grandchild, the death benefits shall be paid in equal shares to surviving dependents of the deceased employee who are parents, stepparents, siblings, or grandparents of the deceased.").
- 13 *Id.* § 417.001(a).
- 14 *Id.* § 417.001(b).
- 15 Argonaut Ins., 87 S.W.3d at 530.
- **16** TEX. LAB.CODE § 417.002(a).
- 17 *Id.* § 417.002(b).
- 18 *Id.* § 417.002(c).

- 19 *Id.* § 417.002(a) (emphasis added); TEX. GOV'T CODE § 311.016 (providing that unless the context requires otherwise, "'[s]hall' imposes a duty").
- Capitol Aggregates, Inc. v. Great Am. Ins. Co., 408 S.W.2d 922, 923 (Tex.1966); accord, Argonaut Ins., 87 S.W.3d at 530; Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865, 869 (1952).
- 21 See TEX. R. CIV. P. 60.
- 22 Citizens State Bank of Sealy, Tex. v. Caney Invs., 746 S.W.2d 477, 478 (Tex.1988).
- 23 In re Lumbermens Mut. Cas. Co., 184 S.W.3d 718, 725–26 (Tex.2006) (citing Ross v. Marshall, 426 F.3d 745, 761 (5th Cir.2005)).
- 24 See TEX. LAB.CODE § 417.003.
- 25 TEX.R. CIV. P. 95.
- 26 See id. 185.
- 27 Id. 47; Low v. Henry, 221 S.W.3d 609, 612 (Tex.2007) ( "Texas follows a 'fair notice' standard for pleading, in which courts assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant to the controversy.").
- 28 See TEX.R. CIV. P. 245.
- 29 See Lege v. Jones, 919 S.W.2d 870, 874 (Tex.App.-Houston [14th Dist.] 1996, no writ); Old Republic Ins. Co. v. Diaz, 750 S.W.2d 807, 810 (Tex.App.-El Paso 1988, writ denied).
- 30 Fax. Workers' Comp. Ins. Fund v. Serrano, 962 S.W.2d 536, 538 (Tex.1998).
- 31 Because Ledbetter's adult daughters are entitled to no worker's compensation benefits, *see* TEX. LAB.CODE § 408.182, the carrier does not assert its subrogation claim against them.
- 32 See Houston Mun. Employees Pension Sys. v. Ferrell, 248 S.W.3d 151, 157 (Tex.2007); Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 59 (Tex.1991).
- 33 TEX.R. CIV. P. 162.
- Univ. of Tex. Med. Branch at Galveston v. Est. of Blackmon ex rel. Shultz, 195 S.W.3d 98, 101 (Tex.2006) (punctuation omitted); BHP Petroleum Co., Inc. v. Millard, 800 S.W.2d 838, 841 (Tex.1990).
- 35 TEX. LAB.CODE § 417.001(b).
- See BHP Petroleum, 800 S.W.2d at 842 (holding plaintiff's nonsuit did not require dismissal of defendant's counterclaim regarding the parties' contractual rights in the future).
- 37 TEX. CIV. PRAC. & REM.CODE § 37.006(a) (providing that a declaratory judgment "does not prejudice the rights of a person not a party to the proceeding"); see, e.g., Brooks v. Northglen Ass'n, 141 S.W.3d 158, 163 (Tex.2004).
- See, e.g., Capitol Aggregates, Inc. v. Great Am. Ins. Co., 408 S.W.2d 922, 924 (Tex.1966) (affirming judgment against worker and tortfeasor who settled without reimbursing carrier); Pan Am. Ins. Co. v. Hi–Plains Haulers, Inc., 163 Tex. 1, 350 S.W.2d 644, 646–47 (1961) (holding that "where the employee and the third party entered into a settlement, both employee and the third party were liable to the carrier for the amount so paid up to the amount of compensation paid by the carrier to the employee"); Estrada v. Wausau Ins. Co., 985 S.W.2d 480, 484 (Tex.App.-San Antonio 1998, pet. denied); Prewitt & Sampson v. City of Dallas, 713 S.W.2d 720, 723 (Tex.App.-Dallas 1986, writ ref'd n.r.e.) (noting carrier may bring conversion action against plaintiff's attorney).
- 39 Capitol Aggregates, 408 S.W.2d at 924 (holding that when carrier seeks reimbursement of settlement funds paid to worker, "the party entitled to the money is attempting to recover from one who wrongfully received the same, and the [tortfeasor] will not be subjected to double liability").

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Distinguished by Reyes v. Manrique, Tex.App.-Corpus Christi, September 20, 2018

315 S.W.3d 860 Supreme Court of Texas.

The TRAVELERS INSURANCE COMPANY (The Automobile Insurance Company of Hartford Connecticut), Petitioner,

Barry JOACHIM, Respondent.

No. 08–0941.

|
Argued Feb. 17, 2010.

|
Decided May 14, 2010.

|
Rehearing Denied Aug. 27, 2010.

#### **Synopsis**

**Background:** Insured filed nonsuit without prejudice to refiling in action against his automobile insurer for underinsured motorist benefits, and trial court later dismissed case with prejudice for want of prosecution. Insured then filed another action asserting same claims against insurer. The 72nd District Court, Lubbock County, Ruben Gonzales Reyes, J., entered summary judgment for insurer based on affirmative defense of res judicata. Insured appealed. The

Amarillo Court of Appeals, 279 S.W.3d 812, James T. Campbell, J., reversed and remanded.

[Holding:] On petition for review, the Supreme Court, Green, J., held that filing of nonsuit did not strip first trial court of jurisdiction to dismiss case with prejudice, such that subsequent erroneous dismissal with prejudice was voidable, not void, and was subject only to direct attack to avoid becoming final judgment for purposes of res judicata.

Judgment of Court of Appeals reversed; case dismissed with prejudice.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (12)

## [1] Appeal and Error



An appellate court reviews a trial court's summary judgment de novo.

534 Cases that cite this headnote

## [2] Judgment

← Nature and requisites of former recovery as bar in general

The party relying on the affirmative defense of res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. Vernon's Ann. Texas Rules Civ. Proc., Rule 94.

90 Cases that cite this headnote

## [3] Judgment

Nature and elements of bar or estoppel by former adjudication

#### **Judgment**

Matters which might have been litigated

## **Judgment**

Matters actually litigated and determined

Under the affirmative defense of res judicata, the judgment in the first suit precludes a second action by the parties and their privies on matters actually litigated and on causes of action or defenses arising out of the same subject matter that might have been litigated in the first suit. Vernon's Ann. Texas Rules Civ. Proc., Rule 94.

44 Cases that cite this headnote

## [4] Pretrial Procedure

Right in general

## **Pretrial Procedure**

Discretion and leave of court

A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

23 Cases that cite this headnote

#### [5] Pretrial Procedure

Motion or request and proceedings thereon

#### **Pretrial Procedure**

Effect

A nonsuit extinguishes a case or controversy from the moment the motion is filed or an oral motion is made in open court, and the only requirement is the mere filing of the motion with the clerk of the court. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

30 Cases that cite this headnote

## [6] Pretrial Procedure

**Effect** 

A nonsuit renders the merits of the nonsuited case moot. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

24 Cases that cite this headnote

## [7] Insurance

Particular matters concluded

### **Judgment**

Figure 1 Involuntary dismissal or nonsuit in general

#### **Judgment**

Void Judgment

#### **Pretrial Procedure**

**Effect** 

Insured's filing of nonsuit, without prejudice to refiling, in action against his automobile insurer for underinsured motorist benefits did not strip trial court of jurisdiction to dismiss case with prejudice, such that subsequent erroneous dismissal with prejudice was voidable, not void, and was subject only to direct attack to avoid becoming a final judgment for purposes of res judicata. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

#### 10 Cases that cite this headnote

## [8] Judgment

Authority of Court or Other Tribunal

#### **Judgment**

Jurisdiction of the person and subjectmatter

A judgment is void only when it is apparent that the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.

40 Cases that cite this headnote

#### [9] Motions

Collateral attack on orders

A void order is subject to collateral attack in a new lawsuit, while a voidable order must be corrected by direct attack.

11 Cases that cite this headnote

### [10] Judgment

Errors and Irregularities

#### **Judgment**

Erroneous or irregular judgment

Unless successfully attacked, a voidable judgment becomes final.

5 Cases that cite this headnote

#### [11] Pretrial Procedure

Parties and claims affected

After a nonsuit, a trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit, as well as jurisdiction over any remaining counterclaims. Vernon's Ann.Texas Rules Civ.Proc., Rule 162.

20 Cases that cite this headnote

## [12] Pretrial Procedure

**Effect** 

When a court initially has jurisdiction to grant relief to resolve a live controversy between parties with proper standing, a party's filing of a nonsuit, while rendering the merits of the case moot, cannot deprive the court of its entire jurisdiction, and the court must retain certain limited authority to dispose of the case following a nonsuit, including the necessary authority to enter a dismissal with prejudice. Vernon's Ann. Texas Rules Civ. Proc., Rule 162.

17 Cases that cite this headnote

### **Attorneys and Law Firms**

\*861 Jeffrey B. Jones, Christopher Bradley Slayton, Jones Flygare Brown & Wharton, Lubbock, for Petitioner.

Stace Lawrence Williams, The Stace Williams Law Firm, P.C., Lubbock, for Respondent.

### **Opinion**

Justice GREEN delivered the opinion of the Court.

In this procedural dispute, we must decide whether a trial court's erroneous dismissal of a suit with prejudice, following the plaintiff's filing of a nonsuit, operates to bar a later suit because of res judicata. We conclude that it does. Therefore, we reverse the court of appeals' judgment and order the case dismissed.

I

Barry Joachim sued his insurer, The Travelers Insurance Company, <sup>1</sup> alleging he was entitled to benefits from Travelers for damages caused by Joachim's accident with an underinsured driver. On the day before trial, Joachim filed a "Notice of Non–Suit" stating that he "no longer wishes to pursue his claims against Defendants," <sup>2</sup> and therefore "gives notice to all parties that his claims against the same are hereby dismissed without prejudice." No motions or counterclaims were pending at that time. Several months later, the \*862 trial court sent notice that if a final order was not filed within 10 days of the notice, the court would dismiss the case for want of prosecution. Joachim asserts he did not receive this notice. The trial court then entered an order that the

case "is hereby dismissed in full with prejudice for want of prosecution." Joachim claims he did not receive a copy of that order either. Unaware of the dismissal order, Joachim neither contested it while the court retained plenary power, see TEX.R. CIV. P. 329b, nor perfected an appeal.

Joachim later refiled the same cause of action, and the case was assigned to a different trial court. Travelers filed a motion for summary judgment based on res judicata. The second trial court granted Travelers' motion and ordered that Joachim take nothing by his suit. Joachim appealed that judgment. The court of appeals reversed, holding that a nonsuit removes a trial court's jurisdiction to enter a dismissal with prejudice.

279 S.W.3d 812, 817 (Tex.App.-Amarillo 2008). The court of appeals therefore determined that the first trial court's order was void, not merely voidable. *Id.* at 818. Thus, it concluded that Travelers failed to establish the defense of res judicata. *Id.* 

II

[1] [2] [3] We review a trial court's summary judgment de novo. Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215 (Tex.2003). The party relying on the affirmative defense of res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex.1996); see TEX.R. CIV. P. 94 (identifying res judicata as an affirmative defense). "The judgment in the first suit precludes a second action by the parties and their privies on matters actually litigated and on causes of action or defenses arising out of the same subject matter that might have been litigated in the

first suit." Gracia v. RC Cola-7-Up Bottling Co., 667 S.W.2d 517, 519 (Tex.1984). Only the first element—prior final determination on the merits—is contested in this appeal.

[4] [5] [6] "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may ... take a non-suit, which shall be entered in the minutes. Notice of the ... non-suit shall be served ... on any party who has answered or who has been served with process without necessity of court order." TEX.R. CIV. P. 162. A party has an absolute right to file a nonsuit, and a trial court is without

discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. See Villafani v. *Trejo*, 251 S.W.3d 466, 468–69 (Tex.2008); *In re Bennett*, 960 S.W.2d 35, 38 (Tex.1997) (per curiam); Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 59 (Tex.1991). A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' or an oral motion is made in open court; the only requirement is 'the mere filing of the motion with the clerk of the court.' " Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz, 195 S.W.3d 98, 100 (Tex.2006) (per curiam) (quoting Shadowbrook Apts. v. Abu-Ahmad, 783 S.W.2d 210, 211 (Tex.1990) (per curiam)). It renders the merits of the nonsuited case moot. See Villafani, 251 S.W.3d at 469 ("One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable."); Shultz, 195 S.W.3d at 101 ("Although [Rule 162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not \*863 forestall the nonsuit's effect of rendering the merits of the case moot."); Gen. Land Office v. OXY U.S.A., Inc., 789 S.W.2d 569, 571 (Tex.1990) ("As a consequence of the trial court's granting the nonsuit, the temporary injunction ceased to exist and the appeal became moot .... It was not necessary for the trial court to enter such a separate order because when the underlying action was dismissed, the temporary injunction dissolved automatically.") (citation omitted).

[7] court's order, which dismissed the case with prejudice, was erroneous because Joachim's nonsuit was without prejudice to refiling. See generally TEX.R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."). The question of whether Travelers established its res judicata defense turns on the issue of whether the trial court's erroneous order was void, or merely voidable. "A judgment is void only when it is apparent that the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." Browning v. Prostok, 165 S.W.3d 336, 346 (Tex.2005) (internal quotation omitted). A void order is subject to collateral attack in a new lawsuit, while

a voidable order must be corrected by direct attack; unless successfully attacked, a voidable judgment becomes final.

See Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985).

After a nonsuit, a trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit, as well as jurisdiction over any remaining counterclaims. See Scott & White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 (Tex.1996) (per curiam) (holding that a trial court has authority to decide a motion for sanctions while it retains plenary power, even after a nonsuit is taken); TEX.R. CIV. P. 162 ("Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk."). We must determine, then, whether filing a nonsuit strips a trial court of jurisdiction to dismiss a case with prejudice.

We have held that an order dismissing a case with prejudice for want of prosecution, though mistaken, is merely voidable and must be attacked directly in order to prevent the order from becoming final for purposes of establishing res judicata. See El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc., 617 S.W.2d 189, 190 (Tex.1981) (per curiam). That the order happens to follow a nonsuit does not make it void. Many litigants use a nonsuit as a procedural device to effectuate a settlement agreement, intentionally dismissing claims with prejudice. Indeed, in this case Joachim had taken a nonsuit with the first trial court "dismissing with prejudice all of Plaintiff's claims" against another defendant with whom Joachim had settled, before he filed the nonsuit as to Travelers. Just as the trial court has jurisdiction to [10] [11] The parties agree that the first trial enter a dismissal with prejudice upon the filing of a nonsuit to effectuate a settlement agreement, it must also have jurisdiction to enter a dismissal with prejudice in other nonsuit situations. See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan, 51 S.W.3d 293, 294-95 (Tex.2001) (per curiam) ("A party cannot by his own conduct confer jurisdiction on a court when none exists otherwise."). Such an order, even if erroneous, is not necessarily void. See Berry v. Berry, 786 S.W.2d 672, 673 (Tex.1990) (per curiam) ("Although a final judgment \*864 may be erroneous or voidable, it is not void and thus subject to collateral attack if the court had jurisdiction of the parties and the subject matter."). Accordingly, we conclude that the trial court's order in this case was voidable, not void. Therefore, the order was subject only to direct attack to avoid becoming a final judgment. See Placke, 698 S.W.2d at 363.

The court of appeals held that because a nonsuit renders the merits of the case moot, the second trial court lacked jurisdiction to render judgment for lack of justiciability. 279 S.W.3d at 816–17. The court stated that a nonsuit "returns the litigants to the positions they occupied before the plaintiff invoked the court's jurisdiction." Id. at 816. This conclusion is in tension with the trial court's authority to address proper matters after a nonsuit is entered, as the court of appeals recognized. See *id.* at 818 (observing that the trial court "retained the power to address the 'collateral' matters listed in Rule 162"); TEX.R. CIV. P. 162 (allowing the trial court to consider motions for sanctions, attorney's fees, or other costs "pending at the time of dismissal"). In Scott & White, we explored this tension further, considering circumstances beyond those contemplated by Rule 162. See 2940 S.W.2d at 596. We held that in the case of collateral motions, such as a motion for sanctions, a trial court may consider them even if they are filed after a nonsuit. See id. 4 In Scott & White, a medical malpractice case, only some defendants were dismissed by nonsuit. See Lid. at 595. After the trial court granted summary judgment for the remaining defendants, all of the defendants-including the nonsuited defendants-filed a motion for sanctions under Texas Rule of Civil Procedure 13, alleging that the suit against them was groundless and brought in bad faith. See !! id. The trial court's authority to consider such a motion was proper in part because it advanced well-recognized policy goals. See id. at 596–97 ("Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by reimbursing the costs incurred in responding to baseless pleadings. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting \*865 the aggrieved party."). Here, too, the power to dismiss a case with prejudice after a nonsuit advances an express policy, as given by the Legislature: to hold a dismissal with prejudice void because it was entered after a nonsuit would undercut the finality of many cases that were dismissed with prejudice after a nonsuit was filed because the parties settled. See TEX. CIV. PRAC. & REM.CODE § 154.002 ("It is the policy of this state to encourage the peaceable resolution of disputes ... and the early settlement of pending litigation through voluntary settlement procedures.").

In addition, the court of appeals' conclusion that the dismissal order was void confuses the subtle differences between mootness and related justiciability concepts, such as ripeness and standing. The court of appeals cited State Bar of Texas v. Gomez, 891 S.W.2d 243, 245 (Tex.1994), for the proposition that jurisdiction depends on justiciability. 279 S.W.3d at 816. It cited Patterson v. Planned Parenthood of Houston, 971 S.W.2d 439, 442 (Tex.1998), for the proposition that a moot case lacks justiciability. 279 S.W.3d at 816. Thus, it concluded that a court lacks jurisdiction over a nonsuited case, since the merits of such a case are moot. 279 S.W.3d at 816–17. However, by concluding that a nonsuit deprives the court of jurisdiction to dismiss a case with prejudice, the court of appeals applied these cases too broadly.

[12] In Gomez, we said: "Subject matter jurisdiction requires

that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." 891 S.W.2d at 245. Similarly, in *Patterson*, we observed that "[t]he constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers doctrine." 971 S.W.2d at 442. However, neither case addressed mootness in general, or a nonsuit in particular. Gomez addressed a case that lacked justiciability from the outset, as certain plaintiffs sought to compel free legal services from the State Bar of Texas, "an entity that is powerless, acting alone, to implement" a mandatory pro bono program for Texas lawyers. 2891 S.W.2d at 245 ("[F]or a controversy to be justiciable, there must be a real controversy between the parties that will be actually resolved by the judicial relief sought."). Likewise, Patterson addressed a matter that was unripe, as it was still unclear whether Planned Parenthood would be deprived of federal funds if the Texas Department of Health implemented a state law that required parental consent to dispense prescription drugs to minors. 2971 S.W.2d at 444 ("Without knowing what the federal government will do, Planned Parenthood cannot show a conflict between federal and state demands or that the state's proposed action will cause it any injury."). Unlike those cases, which lacked justiciability from the moment of pleading, here the nonsuit extinguished what was initially a live controversy, a justiciable case between proper parties. See Shultz, 195 S.W.3d at 100; accord

*Williams v. Lara*, 52 S.W.3d 171, 184 (Tex.2000) ("If a case becomes moot, the parties lose standing to maintain their claims."). When a court initially has jurisdiction to grant relief to resolve a live controversy between parties with proper standing, a party's filing a nonsuit—while rendering the merits of the case moot—cannot deprive the court of its entire jurisdiction. Rather, the court must retain certain limited authority to dispose of the case following a nonsuit, and today we hold that this includes the necessary authority to enter a dismissal with prejudice.

The question remains whether the trial court's voidable order of dismissal is sufficient \*866 to establish Travelers' affirmative defense of res judicata. We conclude it is. Because Joachim failed to attack the trial court's order directly, it became a final judgment for purposes of res judicata.<sup>5</sup> Joachim alleges that he never received notice of the judgment dismissing his cause of action with prejudice. Certainly, if this is true, the lack of notice would not bind him to the effects of the first trial court's erroneous judgment without some potential remedy. 6 However, there is a remedy: an equitable bill of review is a direct attack on a judgment. See TEX.R. CIV. P. 329b(f) (providing that a judgment may be set aside by the trial court by bill of review for sufficient cause);

*McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 709 (1961) ("A bill of review filed in the proper court and against proper parties is one authorized method of making a direct attack on a judgment."); Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex.1979) ("A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment, which is no longer appealable or subject to motion for new trial."); see also Levit v. Adams, 850 S.W.2d 469, 470 (Tex.1993) (per curiam) (allowing a bill of review to proceed because when a party first receives notice of a final judgment more than 90 days after the order is signed, the time limit under Texas Rule of Civil Procedure 306a(4), a

bill of review is a proper method of seeking relief); Wolfe v. Grant Prideco, Inc., 53 S.W.3d 771, 775 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (reversing summary judgment dismissing a bill of review claim filed after the plaintiff's earlier case was dismissed for want of prosecution). Had the trial court set aside the judgment, either by timely motion for new trial or by bill of review, Joachim's underlying claim would no longer be barred by res judicata, as there would no longer be a final determination on the merits. <sup>7</sup> Yet, because the first trial court's order stands, Joachim's claim is barred. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing Joachim's cause of action with prejudice based on Travelers' defense of res judicata.

### Ш

We hold that because a trial court has jurisdiction to enter orders dismissing a case with prejudice upon filing of a nonsuit, the trial court's order here was voidable, not void, and subject only to direct attack. Because Joachim failed to attack the trial court's order directly, it became a final determination on the merits for purposes of res judicata. Therefore, we reverse the court of appeals' judgment and render judgment dismissing the case with prejudice.

### **All Citations**

315 S.W.3d 860, 53 Tex. Sup. Ct. J. 745

### Footnotes

3

- The parties agree that The Automobile Insurance Company of Hartford, Connecticut issued Joachim's policy. For 1 convenience, however, we refer to the respondent in this case as Travelers because The Travelers Insurance Company is the entity Joachim named first in his trial court petitions. 2
  - Joachim's first petition included several insurance companies as defendants.
  - We have used similar language in discussing a dismissal. See Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 104 (Tex.1962) ("It is elementary that a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought."). However, Crofts did not involve a nonsuit. The court in Crofts dismissed a divorce petition, while a related suit was pending in Maryland. See !- id. at 103. Crofts held that a trial court could not be ordered by writ of mandamus to give possession of children to a mother after the trial court had dismissed the case. See !- id. at 104-05. Even if the circumstances of that dismissal could be considered analogous to a nonsuit, however, we do not read the Crofts

- language so strictly as to deprive the trial court of all authority after it dismisses a case—or after it should dismiss a case, as in a typical nonsuit scenario.
- In Scott & White, our holding was limited to the situation where the trial court granted a collateral motion for sanctions during the period when it retained plenary power. See 940 S.W.2d at 596. In this case, however, the trial court's plenary power is not at issue because after Joachim filed his nonsuit, the record shows that the trial court never entered a judgment until it entered its dismissal with prejudice. See TEX.R. CIV. P. 329b(d) ("The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed."); Shultz, 195 S.W.3d at 100 (observing that although a nonsuit is effective upon its filing, expiration of plenary power is determined from the date on which a trial court signs an order dismissing the suit).
- We note that none of Joachim's allegations in the trial court, even when construed liberally, can plausibly be considered as being in the nature of a claim for bill of review or similar relief.
- The United States Supreme Court recently observed, for instance, that comparable relief under Federal Rule of Civil Procedure 60(b)(4) (relief from a final judgment that is void) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." United Student Aid Funds, Inc. v. Espinosa, 559 U.S. ——, ——, 130 S.Ct. 1367, 1377, 176 L.Ed.2d 158 (2010). Here, however, although Joachim mentions his lack of notice, Joachim asserted only jurisdictional error as a legal argument.
- We offer no opinion as to whether Joachim might have succeeded in having the trial court set aside its judgment by pursuing an equitable bill of review or any other remedy in the trial court.

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458 S.W.3d 912 Supreme Court of Texas.

WELLS FARGO BANK, N.A., Petitioner,

v.

Patrick O'Brien MURPHY a/k/a O'Brien Murphy and Beverly Murphy, Respondents

No. 13–0236

|
Argued October 15, 2014

|
OPINION DELIVERED: February 6, 2015

|
Rehearing Denied June 5, 2015

### **Synopsis**

**Background:** After home equity lender applied for an expedited court order authorizing foreclosure, borrowers filed separate declaratory judgment action challenging lender's right to foreclose, and requested attorney fees. Lender answered and counterclaimed for declaratory judgment, and also requested attorney fees. The 55th District Court, Harris County, Jeff Shadwick, J., awarded summary judgment to lender, and ordered borrowers to pay \$116,505.75 in attorney fees. Borrowers appealed, and the Houston Court of Appeals,

Fourteenth District, 2013 WL 510129, Margaret Garner Mirabal, Senior Justice, affirmed the summary judgment award, but reversed the attorney fee award. Lender filed petition for review, which was granted.

Holdings: The Supreme Court, Green, J., held that:

- [1] trial court had authority under the Uniform Declaratory Judgments Act (UDJA) to award attorney fees to lender, and
- [2] attorney fees incurred by lender were not part of the "extension of credit" to borrowers within the meaning of constitutional homestead provision.

Reversed in part, and trial court judgment reinstated.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (12)

### [1] Costs

American rule; necessity of contractual or statutory authorization or grounds in equity

Generally, a party may not recover attorney fees unless authorized by statute or contract.

11 Cases that cite this headnote

### [2] Costs

- Declaratory judgment

Home equity lender that sought attorney fees after prevailing in borrowers' declaratory judgment action satisfied the requirement that it affirmatively plead for an attorney fee award; lender's first amended answer and counterclaim pled that lender was entitled to recover its attorney fees pursuant to the Uniform Declaratory Judgments Act (UDJA), and lender's prayer for relief generally requested that its attorney fees be assessed against borrowers. Tex. Civ. Prac. & Rem. Code Ann. § 37.009; Tex. R. Civ. P. 301.

6 Cases that cite this headnote

# [3] Appeal and Error

← In general; adhering to theory pursued below

Parties are restricted on appeal to the theory on which the case was tried; appellate courts are similarly restricted and may not overlook the parties' trial theories.

1 Cases that cite this headnote

### [4] Appeal and Error

Proceedings for review

A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.

6 Cases that cite this headnote

### [5] **Appeal and Error**

Determination of questions of jurisdiction in general

# **Appeal and Error**

Organization and Jurisdiction of Lower Court

Courts may raise jurisdictional issues for the first time on appeal, and may do so sua sponte.

Cases that cite this headnote

### [6] **Declaratory Judgment**

Jurisdiction not enlarged

The Uniform Declaratory Judgments Act (UDJA) does not confer jurisdiction, but is merely a procedural device for deciding cases already within a court's jurisdiction. Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

4 Cases that cite this headnote

### [7] **Declaratory Judgment**

Appeal and Error

Home equity borrowers failed to preserve, for purposes of appeal, any argument that their declaratory judgment claim against lender should be recharacterized as some other type of claim, and thus Court of Appeals could not reverse trial court's attorney fee award to lender, which was awarded pursuant to the Uniform Declaratory Judgments Act (UDJA), on the ground that neither party had pleaded a claim for declaratory relief; borrowers did not raise the recharacterization argument with respect to their own claim either in the trial court or in the Court of Appeals. Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

1 Cases that cite this headnote

### [8] **Costs**

Declaratory judgment

Trial court had authority under the Uniform Declaratory Judgments Act (UDJA) to award attorney fees to home equity lender in declaratory judgment action brought by borrowers, regardless of whether lender pleaded a cognizable claim for declaratory relief against borrowers, where borrowers pleaded for declaratory relief, and lender pleaded for the recovery of its attorney fees for either prosecuting or defending a claim for declaratory relief. Tex. Civ. Prac. & Rem. Code Ann. § 37.009; Tex. R. Civ. P. 301.

4 Cases that cite this headnote

### [9] Costs

# Declaratory judgment

Attorney fees incurred by home equity lender in borrowers' declaratory judgment action were not part of the "extension of credit" to borrowers within the meaning of constitutional homestead provision, and thus nonrecourse status of the home equity loan did not prevent lender from recovering those fees from borrowers pursuant to the Uniform Declaratory Judgments Act (UDJA); lender's attorney fees were not incurred enforcing the note or because of borrowers' failure to perform the covenants and agreements contained in the security instrument, but defending against the borrowers' declaratory judgment action, which was not the kind of legal proceeding contemplated by the security instrument. Tex. Const. art. 16, § 50(a)(6);

Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

2 Cases that cite this headnote

### Homestead [10]

Exceptions from exemptions in general

Liens against homestead property are not valid unless they are authorized by the state constitution. Tex. Const. art. 16, § 50.

Cases that cite this headnote

### **Constitutional Law** [11]

Resolution of non-constitutional questions before constitutional questions

As a rule, Supreme Court first seeks to resolve disputes upon nonconstitutional grounds; conversely, Supreme Court decides constitutional questions only when it cannot

resolve a dispute upon nonconstitutional grounds.

Cases that cite this headnote

### [12] **Costs**

# Declaratory judgment

An award of attorney's fees under the Uniform Declaratory Judgments Act (UDJA) is subject to modification based upon certain limiting principles, such as the requirement that fees be awarded only when it would be equitable and just to do so and the principle of segregation of fees. Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

5 Cases that cite this headnote

\*913 ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

### **Attorneys and Law Firms**

Caren Panzer DeLuccio, Christopher Benjamin Dove, Daniel John Pettit, Derrick Bryan Carson, Locke Lord LLP, Houston, Robert T. Mowrey, W. Scott Hastings, Locke Lord LLP, Dallas, for Petitioner.

Bertrand C. Moser, Houston, for Respondents.

Beverly Murphy, Houston, Pro Se.

\*914 Patrick O'Brien Murphy, Houston, Pro Se.

# **Opinion**

Justice Green delivered the opinion of the Court.

In this dispute between two home-equity borrowers and their lender, we must determine whether the parties' loan agreement or the Texas Constitution prohibits an award of attorney's fees in the borrowers' separate and original declaratory judgment action that invoked the automatic stay and dismissal provisions of Texas Rule of Civil Procedure 736.11. The court of appeals held that neither party had pleaded a cognizable claim for declaratory relief and the nonrecourse status of the home-equity loan prohibited a personal judgment

for attorney's fees against the borrowers. 455 S.W.3d 621, 629, 2013 WL 510129 (Tex.App.-Houston [14th Dist.]

2013). We hold that the home-equity borrowers, who filed a separate and original declaratory judgment action, may not avoid personal liability for any resulting fee award. Accordingly, we reverse the court of appeals' judgment in part and reinstate the trial court's judgment in favor of the lender.

# I. Factual and Procedural Background

Patrick O'Brien Murphy and Beverly Murphy (collectively "the Murphys") refinanced their existing home loan by obtaining a \$252,000 home-equity loan from Wells Fargo Bank, N.A. in January 2006. The parties executed a note and an accompanying security instrument that created a home-equity lien on the Murphys' homestead. Both loan documents memorialize or secure an "extension of credit as defined by

Section 50(a)(6), Article XVI of the Texas Constitution" and recite that the "Note is given without personal liability against each owner."

The Murphys quickly fell behind on their loan obligations. They failed to pay their property taxes in 2007, 2008, and 2009, and their monthly loan payments were late beginning in November 2006. They stopped making loan payments altogether in February 2008. Shortly after the Murphys stopped making payments, Wells Fargo sent them notice of default, acceleration, and intent to foreclose. When the Murphys did not cure their default, Wells Fargo filed an application in the 295th District Court for an expedited court order authorizing foreclosure pursuant to the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 736.1.

The Murphys then filed a separate and original proceeding in the 55th District Court. Pursuant to Rule 736.11(a), the filing of the Murphys' lawsuit automatically stayed Wells Fargo's application for an expedited foreclosure. <sup>1</sup> Upon the Murphys' motion and pursuant to Rule 736.11(c), the 295th District Court dismissed Wells Fargo's application. <sup>2</sup> In their separate and original proceeding, the Murphys pleaded for specific performance of an oral contract to refinance the loan, \*915 declaratory judgment, and common law fraud. The Murphys' petition also requested attorney's fees. The Murphys later amended their petition to assert a claim under the Texas Deceptive Trade Practices—Consumer Protection

Act (DTPA). See generally TEX. BUS. & COM. CODE § 17.50. Wells Fargo answered with a general denial and later amended its answer to assert several affirmative defenses and a counterclaim for declaratory judgment. In its amended

answer, Wells Fargo requested attorney's fees pursuant to the Uniform Declaratory Judgments Act (UDJA). *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

The parties filed competing motions for summary judgment. Wells Fargo moved for summary judgment on all of the Murphys' claims and its own claim for declaratory relief, requesting attorney's fees for both prosecuting and defending a declaratory judgment action. The Murphys opposed Wells Fargo's motion, arguing, among other things, that Wells Fargo's claims should not be characterized as requesting declaratory relief. However, the Murphys never challenged the characterization of their own claims requesting declaratory relief. Following a hearing, the trial court denied the Murphys' motion, granted Wells Fargo's motion, found the Murphys had defaulted on their home-equity loan, and ordered the Murphys to pay Wells Fargo \$116,505.75 in attorney's fees.

The Murphys appealed the trial court's summary judgment rulings and the attorney's fee award in favor of Wells Fargo. The court of appeals affirmed the trial court's summary judgment that the Murphys had defaulted. 455 S.W.3d at 625. However, the court of appeals reversed the attorney's fee award. Id. In doing so, the court of appeals held that neither party had pleaded for declaratory relief and that the nonrecourse status of the home-equity loan prohibited a personal judgment against the Murphys. Id. at 629.

Wells Fargo petitioned this Court for review of the attorney's fee award issue. We granted the petition. 57 TEX. SUP. CT. J. 753 (June 20, 2014).

### II. Wells Fargo's Attorney's Fee Award

In challenging the court of appeals' ruling on attorney's fees, Wells Fargo contends that (1) both parties pleaded for declaratory relief, and (2) the parties' home-equity loan agreement and the Texas Constitution do not prohibit a personal judgment for attorney's fees against the Murphys. We address Wells Fargo's contentions in turn.

### A. Grounds for the Attorney's Fee Award

[1] Wells Fargo's first contention—that both parties' pleadings support the fee award–requires us to analyze

the pleadings and determine whether the parties pleaded cognizable claims for declaratory relief. Generally, a party may not recover attorney's fees unless authorized by statute or contract. \*\*Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 119 (Tex.2009). The UDJA authorizes a trial court to award "reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Absent exceptions not applicable here, the party requesting attorney's

fees must affirmatively plead for them to be eligible for a

judgment containing a fee award. See TEX. R. CIV. P. 301.

[2] In the body of its first amended answer and counterclaim, Wells Fargo pleaded that it "is entitled to recover its attorney's fees ... pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code." Well Fargo's prayer for relief \*916 generally requested that its attorney's fees be assessed against the Murphys. Accordingly, Wells Fargo satisfied Rule 301's requirement that it affirmatively plead for an attorney's fee award.

On appeal to this Court, the Murphys contend that, despite the pleadings, Wells Fargo may not recover its attorney's fees because *neither* party pleaded a cognizable claim for declaratory relief. For the first time, the Murphys argue that their own pleadings did not state a cognizable claim for declaratory relief. The Murphys also argue, as they did in the trial court, that Wells Fargo's claim should be re-characterized as being for something other than declaratory relief.

[6] "Parties are restricted on appeal to the [5] [4] theory on which the case was tried." Davis v. Campbell, 572 S.W.2d 660, 662 (Tex.1978). Appellate courts are similarly restricted and may not overlook the parties' trial theories. See id. Likewise, in the summary judgment context, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal. San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209-10 (Tex.1990) (per curiam). While it is true that courts may raise jurisdictional issues for the first time on appeal and may do so sua sponte, see Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445-46 (Tex.1993), the UDJA does not confer jurisdiction, but "is merely a procedural device for deciding cases already within a court's jurisdiction." State v. Morales, 869 S.W.2d 941,

947 (Tex.1994) (citation omitted). Therefore, an appellate court may not re-characterize the parties' claims as being for something other than declaratory relief unless the parties preserved the issue for appeal.

[7] [8] Here, both parties pleaded for "declaratory judgment." The pleadings sufficiently characterize the parties' claims as being within the purview of the UDJA. See, e.g., First Am. Title Ins. Co. of Tex. v. Willard, 949 S.W.2d 342, 352 (Tex.App.—Tyler 1997, writ denied) ("There is no particular type of pleading required by the [UDJA]."); Canales v. Zapatero, 773 S.W.2d 659, 661 (Tex.App.—San Antonio 1989, writ denied). Despite the Murphys' trial strategy and argument on appeal, neither of which challenged the characterization of their own claim, the court of appeals held that neither party had pleaded a claim for declaratory relief. 455 S.W.3d at 630. This sua sponte re-characterization of the Murphys' claim was not based upon jurisdictional grounds; rather, it was based upon the "basic character of the litigation."

Id. Because the Murphys did not preserve their recharacterization argument regarding their own claim in the trial court or even raise it in the court of appeals, it was error for the court of appeals to address it sua sponte. Accordingly, we must accept the Murphys' claim as what it purports to be—a claim for declaratory relief. Because the Murphys pleaded for declaratory relief and Wells Fargo pleaded for the recovery of its attorney's fees for either prosecuting or defending a claim for declaratory relief, the trial court was authorized to enter a judgment awarding Wells Fargo its attorney's fees under the UDJA. See TEX. CIV. PRAC. & REM. CODE § 37.009.

# \*917 B. The Nonrecourse Status of the Home–Equity Loan

[9] Wells Fargo's second contention is that neither the parties' home-equity loan agreement nor the Texas Constitution prohibits a personal judgment for attorney's fees against the Murphys. To properly analyze Wells Fargo's contention, we must determine whether an award of attorney's fees in a separate and original declaratory judgment action that invokes the automatic stay and dismissal provisions in Texas Rule of Civil Procedure 736.11 is included within the "extension of credit."

[10] Liens against homestead property are not valid unless they are authorized by our Constitution. See Doody v. Ameriquest Mortg. Co., 49 S.W.3d 342, 344-45 (Tex.2001). In 1997, Texas voters approved an amendment to our Constitution to allow home-equity lenders to secure homeequity loans with homestead property. Id. at 343. The parties' loan agreement unambiguously states that it is made pursuant to this constitutional authority. The Murphys' note states that it is an "extension of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution." The security instrument defines "extension of credit" to mean "the debt evidenced by the Note, as defined by Section 50(a)(6), Article XVI of the Texas Constitution." Finally, the note and security instrument both mirror the constitutional provision's language by stating the "Note is given without personal liability against each owner."

No one disputes that "without personal liability against each owner" limits the sources of funds from which Wells Fargo may seek payment of the loan. Courts have traditionally described nonrecourse loans with such language. See, e.g., Fein v. R.P.H., Inc., 68 S.W.3d 260, 266 (Tex.App.-Houston [14th Dist.] 2002, pet. denied) ("A nonrecourse note has the effect of making a note payable out of a particular fund or source, namely, the proceeds of the sale of the collateral securing the note."); Hinckley v. Eggers, 587 S.W.2d 448, 450 (Tex.Civ.App.-Dallas 1979, writ ref'd n.r.e.) ("[Nonrecourse] provisions have the effect of making the note payable out of a particular fund or source, namely, the proceeds of a sale of the property covered by the deed of trust."). Moreover, the parties agreed that "the Note Holder can enforce its rights under this Note solely against the property and not personally against any owner of such property." Given this historical context and the parties' own definition, in the event of default, Wells Fargo could seek payment of the home-equity loan only from the collateral, and could not seek a deficiency judgment against the Murphys personally.

The parties propose differing interpretations of the meaning of "extension of credit." Wells Fargo argues that a lender can recover fees or costs for defending against a borrower's separate and original proceeding challenging the foreclosure because those fees were not incurred pursuing a judgment against the borrower based upon the "extension of credit." Ultimately, according to Wells Fargo, the Constitution does not prohibit the recovery of attorney's fees in such a

separate and original proceeding if that recovery is otherwise authorized by law. The Murphys contend that their separate and original lawsuit merely contested their alleged default, \*918 and they implicitly argue for a more expansive definition of "extension of credit."

[11] As a rule, this Court first seeks to resolve disputes upon nonconstitutional grounds. See, e.g., In re B.L.D., 113 S.W.3d 340, 349 (Tex.2003). Conversely, we decide constitutional questions only when we cannot resolve a dispute upon nonconstitutional grounds. Id. In accordance with this rule, we first look to the parties' home-equity loan agreement. The parties' agreement defines "extension of credit" in a manner that incorporates the definition of that phrase as used in section 50(a)(6) of the Constitution. Therefore, despite our general rule, we must look to the constitutional definition to interpret the parties' home-equity loan agreement.

We recently defined "extension of credit," for purposes of section 50(a)(6), to consist of "all the terms of the loan transaction." *Sims v. Carrington Mortg. Servs., L.L.C.*, 440 S.W.3d 10, 16 (Tex.2014). The terms of the loan transaction may include the payment of principal, interest, taxes, insurance premiums, and other related expenses. *Id.* Therefore, despite the parties' loan agreement deferring to constitutional definitions, we look to that very agreement to determine the extension of credit's scope. *See id.* 

The parties' loan agreement contains several terms regarding Wells Fargo's recovery of its attorney's fees and other costs. If the attorney's fee award falls within one of these terms, it necessarily falls within the extension of credit's scope and must be without recourse for personal liability. See id.; see also TEX. CONST. art. XVI § 50(a)(6)(C). The note states that "the Note Holder will have the right to be paid back by [the Borrowers] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law." Section 9 of the security instrument provides a much more detailed framework:

If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument

or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument....

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

Wells Fargo was awarded its attorney's fees for defending against the Murphys' separate and original declaratory judgment action that invoked the automatic stay and dismissal provision of Texas Rule of Civil Procedure 736.11. This factual and procedural scenario presents three ways that the fee award may fall within \*919 one of the loan agreement's terms. First, Wells Fargo might have incurred "costs and expenses in enforcing th[e] Note." However, Wells Fargo is not enforcing the note but is rather defending against the Murphys' separate and original declaratory judgment action. Second, Wells Fargo might have incurred its attorney's fees because the Murphys failed "to perform the covenants and agreements contained in th[e] Security Instrument." Once again, however, Wells Fargo is defending against the Murphys' separate and original declaratory judgment action, rather than protecting itself against the Murphys' breach of covenants or agreements contained in the security instrument. Finally, Wells Fargo might have incurred its attorney's fees because "there is a legal proceeding that might significantly affect [its] interest in the Property." While there was a legal proceeding, it was not a legal proceeding of the kind contemplated by the security instrument, which addresses those proceedings in "bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations." These enumerated legal proceedings have two primary similarities: none of the covered proceedings are brought by the borrower directly against the lender, and none of the covered proceedings contest the merits of the underlying loan. The Murphys' separate and original

declaratory judgment action does both, and therefore falls outside of this term's scope.

Here, Wells Fargo applied for an expedited order allowing for the foreclosure of its lien against the Murphys' home. The Murphys did not file a response in that proceeding, but rather invoked the automatic stay and dismissal provisions of Rule 736.11 by filing a separate and original proceeding in the district court. In that proceeding, the Murphys pleaded for specific performance of an oral contract to refinance the loan, declaratory judgment that Wells Fargo was not entitled to foreclose, common law fraud, DTPA violations, and their own attorney's fees. Having initiated a separate and original proceeding, and having provided a mechanism for Wells Fargo to both incur and recover its attorney's fees, there is no basis for the Murphys to hide behind the nonrecourse status of their home-equity loan.

### III. Reinstatement of the Trial Court's Judgment

[12] An award of attorney's fees under the UDJA is subject to modification based upon certain limiting principles. Under section 37.009, a trial court may award reasonable and necessary attorney's fees only when it would be equitable and just to do so. TEX. CIV. PRAC. & REM. CODE \$ 37.009; see \*\*Bocquet v. Herring, 972 S.W.2d 19, 21

§ 37.009; see Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex.1998). These statutory limitations are complimented by other limiting principles, such as segregation of fees. See, e.g.,

Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313–14 (Tex.2006) (requiring litigants to segregate attorney's fees

between claims that allow for the recovery of attorney's fees and claims that do not).

The Murphys did not assert any limiting principles before the trial court or the court of appeals. Therefore, we do not address whether the amount of the trial court's \$116,505.75 attorney's fee award was an abuse of discretion, based upon insufficient evidence, or failed to segregate recoverable and unrecoverable fees. *See id.*; \*\*Bocquet, 972 S.W.2d at 21. We reinstate the trial court's judgment in favor of Wells Fargo for the full amount.

### IV. Conclusion

Wells Fargo pleaded to recover its attorney's fees for either defending or prosecuting \*920 a claim for declaratory relief. Because the Murphys failed to preserve any challenge to the characterization of their own claim for declaratory relief, the trial court was authorized to enter a judgment awarding Wells Fargo its attorney's fees under the UDJA. Neither the parties' loan agreement nor the Texas Constitution prohibits a personal judgment against the Murphys for attorney's fees. Therefore, we reverse the court of appeals' judgment in part and reinstate the trial court's judgment in favor of Wells Fargo.

Justice Johnson did not participate in the decision.

# **All Citations**

458 S.W.3d 912, 58 Tex. Sup. Ct. J. 303

### Footnotes

- The relevant portion of Rule 736.11(a) states: "A proceeding or order under this rule is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract, or lien." TEX. R. CIV. P. 736.11(a).
- The relevant portion of Rule 736.11(c) states:
  - Within ten days of filing suit, the respondent must file a motion and proposed order to dismiss or vacate with the clerk of the court in which the application was filed giving notice that respondent has filed an original proceeding contesting the right to foreclose in a court of competent jurisdiction. If no order has been signed, the court must dismiss a pending proceeding.

TEX. R. CIV. P. 736.11(c).

- The Murphys' counsel at oral argument agreed, stating: "I cannot get around the fact that what [the Murphys] filed was a declaratory judgment action.... [T]hat's what the pleading says."
- Because one of Wells Fargo's pleaded grounds for attorney's fees is valid, we do not reach the question of whether Wells Fargo pleaded a cognizable claim for declaratory relief.
- We do not address Wells Fargo's broader argument that when a lender seeks to foreclose on collateral it is also not pursuing a deficiency judgment and is therefore not prohibited from collecting its attorney's fees.

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# Exhibit D

# TEXAS LAWYER

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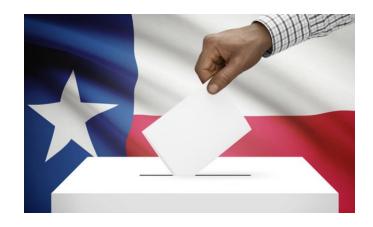
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# 'Blue Wave' Hits Texas Judiciary as Democrats Win Seats on Four Appellate Courts

While Democrats failed to elect a single candidate to statewide office in Texas in yesterday's 2018 general election, a blue wave did manage to hit the state hard in crucial down-ballot races, as Democrats won every single seat up for grabs on four of its most influential intermediate appellate courts.

By John Council | November 07, 2018

While Democrats failed to elect a single candidate to statewide office in Texas in yesterday's 2018 general election, a blue wave did manage to hit the state hard in crucial downballot races, as Democrats won every single seat up for grabs on four of its most influential intermediate appellate courts.



In upsets that few political observers—including some of the candidates who won the races—expected, Democrats took five seats each on Houston's all-Republican First Court of Appeals and all-Republican Fourteenth Court of Appeals, eight seats on Dallas' all-Republican Fifth Court of Appeals, four seats on Austin's all-Republican Third Courts of Appeals and four seats on San Antonio's Fourth Court of Appeals.

Perhaps even more astonishing for deep-red Texas, Democrats now hold the majority on all four of those courts, which hear the vast majority of the state's civil and criminal appeals.

"We were not confident at all," <u>Amanda Reichek</u>

(<a href="http://amandareichekforjustice.com/">http://amandareichekforjustice.com/</a>), a Dallas employment attorney who beat longtime Republican incumbent Justice Molly Francis, said of her Democratic colleagues' chances of victory on the Fifth Court. "We thought it was going to be a squeaker. We thought it would be by a fraction of a percentage point. We had a massive group of voters, and we had no idea how they were going to vote."

Yet Reichek and each of her Democratic running mates for the Fifth Court ended up beating their Republican opponents by six percentage points.

"I think that all of us ran because this court had become an echo chamber. It had been Republican dominated since 1992 and represented institutional interests," Reichek said. "If you represent a human, you were screwed at every turn. And if you represented a company, there was a different set of justice. All of us come from a history of representing individuals, and we wanted to do something about it."

Part of the reason for the upset was, in modern history, Texas has not seen a gubernatorial election cycle in which more than 50 percent of voters cast their ballots. Elections in which the president is not on the ballot have tended to be favorable for Republican candidates in Texas, because Democrats usually are not as energized.

But a marque U.S. Senate race in which El Paso Congressman Beto O'Rourke came somewhat close to toppling Republican Sen. Ted Cruz brought significantly more people to the polls. That race, combined with straight party ticket voting and President Donald Trump's extreme unpopularity in Texas' biggest cities, likely contributed to Republican losses on urban courts of appeals.

"We had a historic turnout last night in Texas," said <u>Brett Busby</u>
(<a href="https://www.brettbusby.com/">https://www.brettbusby.com/</a>), a Republican justice on Houston's Fourteenth
Court who lost his seat to Democratic challenger <u>Jerry Zimmerer</u>
(<a href="https://jerryforjustice.com/">https://jerryforjustice.com/</a>). "It went from a 20 percent turnout from last election to 50 percent turnout. A lot of people voted straight party ticket. It was hard to communicate with so many voters. There were so many straight ticket voters that affected the outcome of some of the races."

The upsets on those four intermediate courts also have another factor in common: All of the courts are based in a solid-blue urban counties with jurisdictions that include once-red suburban counties that are trending purple.

"Not unique to these races is the demographic shift," said <u>David Coale</u> (<a href="http://www.lynnllp.com/attorneys/david-coale">http://www.lynnllp.com/attorneys/david-coale</a>), a Dallas appellate attorney who followed the races. "The cities aren't going to get more red, and the suburbs are getting more purple. Who knows, if it happened in just one place, it might not be that big of a deal. But if it happened in three different places, you might want to pay attention."

Coale expects that the change in jurisprudence on the urban intermediate courts will be subtle because of the new justices.

"You're not going to see a lot of revolutionary changes. But in about a year, you're going to see some changes on some issues—willingness to overturn jury verdicts, summary judgment rulings and compelling arbitration," Coale said. "The Dallas court has a reputation of always accepting arbitration clauses, and that's going to get a hard look."

The importance of those four urban appellate court can't be overstated, said Kurt Kuhn (https://kuhnhobbs.com/kurt-kuhn-appellate-appeals-attorney-tx/), an Austin appellate attorney.

"It's where most of the law is made in Texas because most decisions can't go to the Texas Supreme Court," Kuhn said. "The Supreme Court hears less than 100 cases a year now. Most individual cases are decided in the courts of appeals on the legal issues. And that's the one level of court where you have a right to a second look."

<u>Peter Kelly (https://www.peterkellyforjustice.com/)</u>, a Houston appellate attorney who beat Republican <u>Jennifer Caughey (https://jennifercaughey.com/)</u> to win a seat on Houston's First Court, was coy about whether rulings will change on the court—which has not seen a Democrat since Jim Sharp won a fluke election in 2008 and served a single six-year term.

"We're not allowed to say that," Kelly said. "I would say that most of the Democratic candidates share a healthy respect for jury verdicts and letting questions going to the jury. That's a constitution principle that's embodied in the Seventh Amendment to the Constitution."

Robert Burns (http://judgerobertburns.com/), a Dallas criminal court judge who beat Republican Justice <u>Douglas Lang (http://justicedouglaslang.com/)</u> to become the chief justice of the Fifth Court, expects he and his Democratic colleagues' transition to an appellate court that has been dominated by the GOP for 26 years will be smooth.

"I think right now we and they are shell shocked. We're going to see how it works out. And I've been friends with some of the people on the court for a long time. They're great people," Burns said. "I'm sure we're going to get along just fine. I'm not worried about collegiality at all."

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# Exhibit E



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# Texas Justice Ousted In Election Gets His Old Job Back

## By Michelle Casady

Law360 (November 1, 2019, 11:16 PM EDT) -- A year after losing reelection to the Fifth Court of Appeals bench in Dallas, Judge David Evans is returning to the court, appointed Friday to a vacant seat by Gov. Greg Abbott.

In an interview with Law360 on Friday, Judge Evans said he was notified of his appointment earlier in the day, and was one of many judges who applied to be appointed. He said he hoped to be officially sworn into the court early the next week, but that details hadn't yet been hammered out on exactly how the transition would play out.

He said he was "confident" he would be able to "get along with" all of his former and new colleagues on the Fifth Court of Appeals, including Justice Robbie Partida-Kipness, who defeated Judge Evans in the Place 2 race.

The judge wasn't off the bench long after the election. In February, Abbott appointed him to the trial bench as the judge for the 95th District Court in Dallas County. On the Fifth Court of Appeals, he will be filling the seat vacated by Judge Ada Brown, who was confirmed to a federal judgeship in the U.S. District Court for the Northern District of Texas earlier this year.

But rather than discussing the prestigious appointment, Judge Evans was more interested in talking about his recent kidney donation to his former colleague on the Fifth Court of Appeals, retired Chief Justice Carolyn Wright. He said he's hoping he can raise awareness about living organ donation, and encourage others to consider the procedure.

"If I hadn't donated my kidney I would still have two healthy kidneys ... and I'd probably take them to my grave with me, and what good would that be?" he said. "I would very much encourage considering it. ... It changes the donor's life and it certainly changes the recipient's life."

The procedure took place on Sept. 10, and Judge Evans was back on the bench signing orders by Sept. 30.

Judge Evans' term on the Fifth Court of Appeals will expire in December 2020.

In the historic November 2018 election, **more than a quarter** of Texas' 80 intermediate appellate court justices lost their seats. Much of the turnover came on the appellate courts in the state's largest cities — Houston, Dallas, San Antonio and Austin — and even flipped some Republican-majority courts into Democratic-majority courts.

A small group of Republican justices who were ousted by voters last November, including Judge Evans, have since been reappointed to the bench by Abbott. Two former appellate justices in Houston — **Brett Busby** and **Jane Bland** — now sit on the state's highest court as Texas Supreme Court justices.

When Judge Evans was appointed to the 95th District Court this year, it was to fill the seat vacated by Judge Ken Molberg, who had presided over that court for a decade prior to his November 2018 election to the Fifth Court of Appeals where he will now be colleagues with Evans.

Judge Evans' judicial experience dates back to 1995, when he served for three years as a judge in Dallas County's Court-at-Law No. 1. From 1999 until 2006 he served as district judge for the 193rd District Court in Dallas County, according to his resume available on his campaign website. Prior to his November 2018 defeat, Judge Evans had been on the Fifth Court of Appeals since 2013.

In an effort to ease any transition pains, Judge Evans said he plans to ask Texas Supreme Court Chief Justice Nathan Hecht to sign off on a request that would allow him to wrap up some post-trial hearings in cases he heard while on the 95th District Court. It was something Justice Molberg did, he said, and he's confident that he'll be allowed that opportunity.

Evans is a 1984 graduate of the Southern Methodist University Dedman School of Law.

Messages seeking comment from Abbott and from other justices on the Fifth Court of Appeals were not returned Friday afternoon.

-- Editing by Bruce Goldman.

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